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Supreme Court, U.S.
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In The
Supreme Court of the United States

BETTY WOODS WILSON,
Petitioner,

vs.

MICHAEL W. HALEY, Commissioner,
Alabama Department of Corrections, et al.,
Respondents

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE STATE BREACHED ITS DUTY TO DISCLOSE EXCULPATORY INFORMATION IN WILSON'S CASE.

II. WHETHER THE DISTRICT COURT AND COURT OF APPEALS ERRED BY HOLDING THAT WILSON'S TRIAL COUNSEL COULD HAVE OBTAINED THE PSYCHOLOGIST'S NOTES THROUGH THE EXERCISE OF DUE DILIGENCE.

III. WHETHER THE INFORMATION CONTAINED IN THE PSYCHOLOGIST'S NOTES WAS MATERIAL TO THE OUTCOME OF WILSON'S CASE.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel hereby certifies, pursuant to Rule 14(b), that the following persons and entities haven an interest in this petition:

Kristi Adcock – District Attorney
Cecilee R. Beasley – Appellate Attorney
G. Ward Beeson, III, - Assistant Attorney General
Mo Brooks – District Attorney
Margaret S. Childers – Assistant Attorney General
Bobby Lee Cook – Trial/Appellate Attorney
Cook & Connelly – law firm representing Appellant
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Charles R. Crowder – Appellate Attorney
Harwell G. Davis, III – Magistrate Judge
Russell Jackson Drake – Trial/Appellate Attorney
Jimmy Fry – District Attorney
Judge Paul W. Greene – Magistrate Judge
Charles Hooper - Trial/Appellate Attorney
Richard S. Jaffe – Appellate Attorney
Susan Moquin – District Attorney
Sam C. Pointer, Jr. – U.S. District Court Chief Judge
Bill Pryor – Attorney General
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Stephen A. Strickland – Appellate Attorney
Herman A. Watson – Appellate Attorney
Watson Jimmerson, P.C. – law firm representing Petitioner
Whatley Drake, LLC – law firm representing Petitioner
Betty Woods Wilson - Petitioner
Dr. Jack Wilson (deceased) – victim
Thomas N. Younger – Trial Judge

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CITATIONS OF OFFICIAL REPORTS OF OPINIONS AND ORDERS IN THIS CASE

(1) United States Magistrate Judge's Report and Recommendation (Not Reported)
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(2) United States District Court's Decision (Not Reported)
Wilson v. Harrelson, et al., No. CV97-P-1481-W (N.D. Ala. August 24, 1998)

(3) United States Court of Appeals for the Eleventh Circuit Decision
Wilson v. Haley, 211 F.3d 598 (11th Cir. 2000)

(4) United States Court of Appeals for the Eleventh Circuit Decision on Rehearing
Wilson v. Haley, 216 F.3d 1094 (11th Cir. 2000)

STATEMENT OF JURISDICTION

This Court has jurisdiction over this petition for the writ of certiorari to the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. §1254(1). The Eleventh Circuit Court of Appeals had jurisdiction over this matter pursuant to Rule 22, Federal Rules of Appellate Procedure, and 28 U.S.C. §2253(c). In the Eleventh Circuit Court of Appeals, Wilson appealed the denial by the district court of her habeas petition under 28 U.S.C. §2254. On October 11, 1998, Judge Sam Pointer, Jr. issued a Certificate of Appealability.

STATEMENT OF THE CASE AND THE FACTS

Betty Wilson is presently incarcerated after being convicted of capital murder in the Circuit Court of Tuscaloosa County, Alabama, on March 3, 1993. She was sentenced to life imprisonment without the possibility of parole. Following her conviction, Wilson filed a motion for post-conviction relief with the state trial court. That motion was denied. On April 13, 1995, the Alabama Court of Criminal Appeals released an opinion affirming her conviction and the denial of Wilson's motion for post-conviction relief. The Court of Criminal Appeals also denied Wilson's application for rehearing. *Wilson v. State*, 690 So. 2d 449 (Ala. Cr. App. 1995).

Wilson then filed a petition for the writ of certiorari with the Supreme Court of Alabama. That petition was granted. On January 17, 1997, that court released a decision affirming Wilson's conviction, and quashing as improvidently granted its writ issued to review the denial of her motion for post-conviction relief. Justices Maddox and Butts dissented from the opinion. *Ex parte Wilson*, 690 So. 2d 477 (Ala. 1997). (Appendix, document A; hereinafter referred to as *Wilson*) In an eighteen (18) page dissent, Justice Maddox concluded that the denial of the petition for post-conviction relief was error. Id. On March 21, 1997, the state supreme court overruled Wilson's application for rehearing with Justices Maddox, Butts and See dissenting. Id.

On May 14, 1997, Wilson filed a petition for the writ of habeas corpus in the United States District Court. On June 16, 1998, the United States Magistrate Judge issued a report and recommendation recommending the denial of Wilson's petition. (Appendix, document B). On August 24, 1998, United States District Judge Sam Pointer adopted the Magistrate Judge's report and denied Wilson's petition for the writ of habeas corpus. (Appendix, document C). On

October 11, 1998, Judge Pointer issued a certificate of appealability. (Appendix, document D).

On September 23, 1998, Wilson filed a notice of appeal to the United States Court of Appeals for the Eleventh Circuit. On March 23, 2000, the Eleventh Circuit affirmed the judgment of the district court. (Appendix, document E). On April 5, 2000, Wilson filed an application for rehearing and suggestion of rehearing *en banc*. On May 19, 2000, the Eleventh Circuit issued an order denying Wilson's application for rehearing. (Appendix, document F).

The primary issue on Wilson's appeal was her claim that the state suppressed exculpatory evidence in violation of *Brady v. Maryland*, 83 S.Ct. 1194 (1963). The facts supporting Wilson's *Brady* claim revolve around pre-trial statements and trial testimony given by James White, who the state alleged was Wilson's accomplice, and who was the person the state alleged had committed the murder giving rise to Wilson's conviction. The importance of White's testimony to the state's case against Wilson cannot be exaggerated. That importance was acknowledged by the state in its plea agreement with White, wherein the state admitted that the "capital murder charge against BETTY WOODS WILSON ... would, of necessity, have to be dismissed in absence of this agreement and the testimony and cooperation of James Dennison White." *Wilson* at 485 (Maddox, J. dissenting).

Pursuant to a request by White's attorney, White was examined by a state-employed psychologist to determine his competency to stand trial. That psychologist, Dr. Lawrence Maier, took notes of his interviews with White and later executed a written report. Those notes were not included in the report but were typed, titled "Additional Information Section," and placed in White's file at the Taylor Hardin Secure Medical Facility, a center operated by the Alabama Department of Mental Health and Mental Retardation, on

August 19, 1992, approximately six months before Wilson's trial. *Wilson* at 480-482.

On July 30, 1992, Wilson filed a "Motion for Discovery of Institutional Records and Files Necessary to a Fair Trial." In that motion Wilson specifically requested (1) "[a]ll records generated or maintained by the Alabama Department of Mental Health and Mental Retardation...pertaining to the...accomplice; (2)"[a]ll records pertaining to [the] accomplice and generated by the Taylor Hardin Secure Medical Facility...;" and (3) "[a]ny and all medical, psychological, psychiatric or mental examinations or evaluations relating to...James Dennison White...that [have been] or will be performed by any state agency." *Wilson* at 479-480. On September 2, 1992, the trial court entered an order requiring the state to "maintain an ongoing 'open file' policy with regard to discovery by the defendant," and to allow Wilson to have full access to all such documents that the state knew to exist, "or which with due diligence could be determined to exist." *Wilson*, Appendix A.

Notwithstanding Wilson's specific request, the notes taken by the state-employed psychologist were not turned over to Wilson or her attorneys, despite the fact that the notes had been filed at Taylor Hardin in August 1992, and remained there, unknown to Wilson or her attorneys, until after her trial and conviction. *Wilson* at 480-482.[1] The psychologist's notes regarding his interviews with White were not only material, but contained evidence that would have been of great benefit to Wilson in preparation for trial. As recognized by Justice Maddox in his dissent, "an important component of the prosecution's case was the establishment of a time line that would prove that...Betty Wilson had the opportunity to participate in the murder of her husband." *Wilson* at 483. Two crucial "facts" alleged by the state in its time line was that the murder occurred at approximately 5:00-5:10 p.m., and that Wilson picked White up from the scene at approximately 5:10 p.m. and dropped him off a few minutes later. *Wilson* at 483-484. That time line evidence was crucial to the state's case because, the state argued, it corroborated White's testimony and established a window of opportunity for Wilson's alleged participation. Id. That alleged window of opportunity existed only from 4:50 p.m. until 5:25 p.m. Those parameters were established by the state's witnesses, who showed that Wilson was miles away from the scene of the murder, and in the company of various individuals, before 4:50 p.m. and after 5:25 p.m. *Wilson* at 483.

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[1] In addition, the psychologist's formal report, which did not include the notes, was not produced until February 5, 1993, two weeks before the petitioner's trial, and then only after the petitioner filed a "Motion to Expedite." *Wilson* at 482.

In summary, the state's case against Wilson depended on the jury accepting the prosecution's contentions that (1) the murder occurred between 4:50 p.m. and 5:25 p.m.; and (2) Wilson picked White up from the scene of the murder before 5:25 p.m.

The suppressed interview notes show conclusively that the state's time line was fatally flawed, that the murder did not occur until well after 5:25 p.m., and that the state's theory of the petitioner's participation simply could not have occurred. According to the suppressed interview notes, White told the psychologist that he did not commit the murder until some time between 6:00 p.m. and 6:30 p.m. *Wilson* at 483. Wilson could not have been at the scene, nor could she have picked up White at those times. From 5:25 p.m. until 8:00 p.m., Wilson's whereabouts, miles from both White and the scene of the murder, and in the company of more than a dozen people, was firmly established by both the State and defense witnesses. *Wilson* at 483-484.[2]

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[2] Witness Pam Hyde's testimony also demonstrated that the murder did

ARGUMENT AND CITATIONS OF AUTHORITY

A criminal defendant is entitled to any information the state has that is exculpatory or favorable to the defense. *Brady v. Maryland*, 83 S.Ct. 1194, 1196-97 (1963). The prosecution's duty to disclose favorable evidence under *Brady* covers not only exculpatory evidence, but also information that could be used to impeach a government witness. *United States v. Bagley*, 105 S.Ct. 3375, 3380-81 (1985); *Giglio v. United States*, 92 S.Ct. 763, 766 (1972). The state is also obligated in a capital case to provide information that would be mitigating at the penalty phase of trial. *Green v. Georgia*, 442 U.S. 95 (1979).

In addition, pursuant to Rule 16 of the Alabama Rules of Criminal Procedure, the prosecution must disclose all exculpatory information and all statements made by the defendant, codefendants or any accomplices. *Ex parte Motley*, 534 So.2d 564 (Ala. 1988) and *Ex parte Lambert*, 519 So.2d 899 (Ala. 1987). Rule 16 provides, in relevant part, that:

> the prosecutor shall . . . permit the defendant to . . . inspect, and copy or photograph . . . papers [and] documents . . . which are within the possession, custody, or control of the state/municipality and which are material to the preparation of defendant's defense.

Ala. R. Crim. P. 16.1(c) (emphasis added).

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not occur until after the alleged "window of opportunity." Ms. Hyde testified that she received a phone call from Jack Wilson, the victim, between 5:00 and 5:30 p.m., when, according to the State, Wilson had already been murdered. (Record on Appeal, reporter's transcript, p. 1664).

Rule 16 also provides that:

> [u]pon written request of the defendant, the prosecutor shall ... permit the defendant to inspect and to copy any results or reports of physical or mental examinations or scientific tests or experiments, if the examinations, tests, or experiments were made in connection with the particular case, and the results or reports are within the possession, custody, or control of the state/municipality, and their existence is known to the prosecutor.

Ala. R. Crim. P. 16.1(d)(emphasis added). *See also United States v. Kaplan*, 554 F.2d 577, 579-80 (3rd Cir. 1977) ("Where documentary evidence is exculpatory, it may be within both *Brady* and Rule 16, but nonexculpatory records are obtainable in advance of trial only by virtue of Rule 16). Moreover, in capital cases such as Betty Wilson's, broadened discovery is warranted. *Ex parte Monk*, 557 So.2d 832, 836-837 (Ala. 1989).

A *Brady* violation occurs when (1) the prosecution fails to disclose evidence; (2) the evidence is favorable to the accused either because it is exculpatory or because it is impeaching; and (3) prejudice results from the suppression. *Strickler v. Greene*, 119 S.Ct. 1936, 1948 (1999); *Stano v. Dugger*, 901 F.2d 898, 899 (11th Cir. 1990). To satisfy the prejudice component, the suppressed evidence must be "material;" that is, there must be "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler* at 1948. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 105 S.Ct. 3375 (1985).

The district court and the court of appeals upheld the Court of Criminal Appeals' holding on the *Brady* issue on three grounds: (1) the information in Dr. Maier's notes was not material to the outcome of the case; (2) the state had no duty to disclose this information because Dr. Maier was not an agent of the State and the prosecution had no knowledge of it; and (3) Wilson's trial counsel could have obtained the notes from Dr. Maier himself through the exercise of due diligence.

I. THE STATE HAD A DUTY TO DISCLOSE THE EXCULPATORY INFORMATION.

Wilson was charged with capital murder. She faced either the death penalty or life without parole, and she received a sentence of life without parole. Because Wilson's case was capital, the state owed a broad discovery duty.

Dr. Maier, an employee of the Alabama Department of Mental Health and Retardation, was court appointed to perform a mental competency evaluation of James White. He performed the examination, prepared a report, and gave a copy to the trial court, the prosecutor, and White's attorney.

Subsequently, Wilson's attorneys filed pre-trial discovery requests for (1) all records generated or maintained by the Alabama Department of Mental Health and Mental Retardation pertaining to Wilson, a co-defendant, or an accomplice; (2) all such records generated by the Taylor Hardin Secure Medical Facility; and (3) any and all medical, psychological, psychiatric or mental examinations relating to White that had been or would be performed by any state or governmental agency.

First, the state never objected to Wilson's discovery requests. Nor did it claim that it did not have the requested documents or that it did not owe a duty to produce them. In response to Wilson's discovery request and the court's order, the state produced Dr. Maier's report and responded that it had "given everything that was requested." (T. 39). Therefore, the state clearly had a duty to produce the requested documents because Wilson's attorneys requested all of Dr. Maier's documents, the state did not object, and the trial court ordered the state to produce the documents. The state produced Maier's report, without the exculpatory notes, and then claimed that it had produced everything requested.

Second, as Justice Maddox noted, the state's obligation to provide the defendant with discoverable information is heightened when the defense makes a specific request for it. *United States v. Agurs*, 96 S.Ct. 2392, 2399 (1976). "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." Id. In addition, the failure of the prosecution to turn over specifically requested evidence, to which no objection is filed, could mislead the defendant into believing that the evidence does not exist.

In *Bagley*, the Government suggested that a materiality standard more favorable to the defendant reasonably might be adopted in specific request cases because "an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." *Bagley* at 3383-84. In response to the Government's argument, this Court stated:

> We agree that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial

> decisions on the basis of this assumption.

Bagley, 105 S.Ct. at 3384. Because Wilson's request was specific, the state had a heightened duty to produce the requested documents. *United States v. Agurs*. It breached that duty.

Third, Dr. Maier was an agent of the state. In *Kyles v. Whitley*, 115 S.Ct. 1555 (1995), this Court held that the prosecutor's duty to disclose does not apply only to evidence that he is personally aware of. Instead, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the [state's] behalf in the case . . . ." 115 S.Ct. at 1567. The Court summarized its holding as follows:

> [There is not] any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed. 2d 104 (1972). Since, then, the prosecutor has the means to discharge the [state's] *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the [state's] obligation to ensure fair trials.

Id. at 1568.

Therefore, inherent fairness requires the state to produce evidence that is either actually in its possession or accessible to it. *Calley v. Callaway*, 519 F.2d 184, 223 (5th Cir. 1975); *United States v. Washington*, 550 F.2d 320, 330 (5th Cir. 1977).

Courts nationwide have held that prosecutors have an affirmative duty to search files maintained by different branches of government "closely aligned with the prosecutor" when there is some reasonable prospect of finding exculpatory evidence. *See United States v. Brooks*, 966 F.2d 1500, 1503 (D.C.Cir. 1992) (duty to investigate based on "close working relationship between police and United States Attorney); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (prosecutor's *Brady* obligation extended to a search for FBI files and National Crime Information Center files); *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973) *overruled on other grounds by United States v. Henry*, 749 F.2d 203 (5th Cir. 1984) ("there is no suggestion in *Brady* that different arms of the government, particularly when so closely connected as this one for the purpose of the case, are severable entities; therefore, prosecutor's *Brady* obligation extended to a search for a personnel file of a Post Office employee"). *See also Smith v. Secretary Dept. of Corrections*, 50 F.3d 801, 824 (10th Cir. 1995) ("the prosecution" extends to law enforcement personnel and other arms of the state involved in investigative aspects); *United States v. Osorio*, 929 F.2d 753, 761 (1st Cir. 1991) ("The prosecutor charged with discovery obligations cannot avoid finding out what 'the government' knows, simply by declining to make reasonable inquiry of those in a position to have relevant knowledge."); *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984) ("[A] prosecutor's office cannot get around *Brady* by keeping itself in ignorance, or compartmentalizing information about different aspects of a case."); and *Martinez v. Wainwright*, 621 F.2d 184, 186 (5th Cir. 1980) ("The duty to produce requested evidence falls on the state; there is no suggestion in *Brady* that different 'arms' of the government are severable entities.").

In *United States v. Wood*, 57 F.3d 733 (9th Cir. 1995), the court reversed the appellant's conviction for distributing allegedly dangerous drugs collectively known as GHBs. 57 F.3d at 736-37. In *Wood*, the Food and Drug Administration had in its possession research reports that showed that GHBs were not dangerous. Those reports, had they been disclosed to the defense, would have been exculpatory. Id. at 737-38. As in Wilson's case, the Government argued that the prosecutor was not aware that the reports existed, and thus the Government should be excused for its failure to produce them. Id. at 737. However, the Ninth Circuit rejected the Government's argument:

> For *Brady* purposes, the FDA and the prosecutors were one . . . . The Government cannot with its right hand say it has nothing while its left hand holds what is of value . . . . The Government in the form of the prosecutor cannot tell the Court that there is nothing more to disclose while [a government agency] holds in its files information favorable to the defendant.

Id (emphasis added). The court held that *Brady's* constitutional duty "arose from the unfairness of the Government prosecuting a person while keeping as a secret to itself materials that might exonerate him. It is a duty that assumes that the Government's aim in a criminal trial is not victory but justice." 57 F.3d at 737.

It is clear under the facts and law of this case that the prosecution owed a duty to produce Dr. Maier's notes because he was "closely aligned with the prosecutor" due to his close working relationship with the prosecutor and due to his participation in the evaluation of White. At Wilson's Rule 32 hearing, the parties stipulated that:

> 1. Dr. Lawrence R. Maier was appointed to do a mental competency evaluation of James Dennison White. Dr. Maier is regularly employed on a contract basis by the Alabama Department of Mental Health and Mental Retardation to evaluate all criminal defendants where there is a question as to their mental competency. Dr. Maier is employed to work in the Huntsville, Alabama, area.
>
> * * *
>
> 4. It is the practice of Dr. Maier to cause his notes to be transcribed and typed. Dr. Maier's notes, taken during the interview of James Dennison White, were typed into a three page document entitled "Additional Information Section.' These transcribed notes were sent by Dr. Maier to Taylor Hardin Secure Medical Facility as required of him by the Department of Mental Health and Mental Retardation..."

Wilson at 481.

Dr. Maier was required by the Department of Mental Health and Mental Retardation to transcribe his handwritten notes and to send them to Taylor Hardin to be made part of White's mental competency evaluation. The fact that Dr. Maier was required by a state agency to perform this act strengthens Wilson's argument that the prosecution was under a duty to disclose the notes in this case.

In addition, the prosecution was aware that a competency report had been prepared concerning White and even produced Dr. Maier's report as part of its *Brady* response. A copy of the report was filed with the clerk's office and a copy was given to the prosecutor handling White's case. In *McMillian v. State*, 616 So. 2d 933, 948 (Ala. Cr. App. 1993), this was the basis for the court's holding that the prosecutor had a duty to produce exculpatory evidence found in such reports.

Moreover, at the time of Wilson's trial and thereafter, Dr. Maier was employed by the state and had an extensive working relationship with prosecutors who used him to rebut competency challenges, *Miranda* challenges, and insanity defense challenges. *See Ex parte Janezic*, 723 So. 2d 725, 727 (Ala. 1997); *Tankersley v. State*, 724 So. 2d 557, 566 (Ala. Cr. App. 1998); *Click v. State*, 695 So. 2d 209, 223 (Ala. Cr. App. 1996); *Smith v. State*, 646 So. 2d 704, 713 (Ala. Cr. App. 1994); and *Abernathy v. State*, 642 So. 2d 519, 521 (Ala. Cr. App. 1994);

In fact, Dr. Maier's relationship with the state was so extensive that he expressed a concern to Wilson's attorneys as to whether or not he could talk to them without the permission of the prosecutor. (Rule 32 hearing, page 60). Dr. Maier finally agreed to talk with Wilson's attorneys but limited the discussion to the report itself. Id.

Therefore, the state owed a duty to disclose the exculpatory information contained in Dr. Maier's notes. It breached that duty.

II. THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN HOLDING THAT WILSON'S TRIAL COUNSEL COULD HAVE OBTAINED THE NOTES THROUGH THE EXERCISE OF DUE DILIGENCE.

The due process clause sets the parameters for *Brady*:

> The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to

> deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial....

Bagley, 105 S.Ct. 3375, 3380 (1985) (footnotes omitted).

A prosecutor is required to exercise due diligence to discover exculpatory evidence because he is the representative of a "sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Strickler v. Greene*, 119 S.Ct. 1936, 1948 (1999). Further, as noted by the Fifth Circuit:

> If disclosure were excused in instances where the prosecution had not sought information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the United States Government.

United States v. Auten, 632 F.2d 478, 481 (5th Cir. 1980). *See also United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992), where the court held that the prosecution had violated the principles of *Brady* by failing to search for easily obtainable information. In support of its holding, the court stated "that an inaccurate conviction based on government failure to turn over an easily turned rock is essentially as offensive as one based on government nondisclosure." *Brooks*, 966 F.2d at 1503.

In cases where courts have shifted the blame to defense counsel for failing to discover *Brady* evidence, defense counsel has usually failed to take any action whatsoever to obtain the material. However, the policy reason for shifting the blame to defense counsel has no application to the facts of this case. Not only did Wilson's attorneys request and obtain the report, but they also took the extra step of meeting with Dr. Maier to learn whatever they could to properly cross-examine White. When Wilson's attorneys met with Dr. Maier, they discussed the importance of trying to impeach White concerning how and when Dr. Wilson's death allegedly occurred. However, Maier never told Wilson's attorneys about what White told him regarding the sequence of events, nor did Maier disclose that he had notes concerning that sequence of events. Clearly, Wilson's attorneys tried to do everything possible to properly defend their client.

Instead of blaming defense counsel for the state's suppression, the proper focus should be on (1) the policy reasons behind *Brady*; (2) the fact that Wilson's attorneys repeatedly requested all of Dr. Maier's documents, the trial court ordered that they be produced, the state produced the report but not the crucial notes, and then stated that it had provided everything and Wilson's counsel relied on this statement; and (3) the state's obligation to provide the defendant with discoverable information which is heightened when defense counsel makes a specific request for it. *United States v. Agurs*, 96 S.Ct. 2392, 2399 (1976).

Moreover, this Court recently decided a case right on point where it held that defense counsel reasonably relied on the prosecution's open file policy and assertion that the defendant had already received "everything known to the government." *Strickler v. Greene*, 119 S.Ct. 1936, 1949-50 (1999).

III. THE INFORMATION IN DR. MAIER'S NOTES WAS MATERIAL TO THE OUTCOME OF THE CASE.

In *Kyles v. Whitley*, 115 S.Ct. 1555 (1995), this Court held that *Brady's* materiality standard is not a sufficiency-of-the evidence standard. Instead, the proper test for materiality under *Brady* is whether the suppression of the evidence undermines confidence in the outcome of the trial. 115 S.Ct. at 1566.

The Tenth Circuit has indicated that the test for materiality is a "flexible, sliding scale approach to assessing . . . materiality. . . . [T]he specificity of the request (for production) is inversely related to the prosecution's disclosure obligation. As the specificity of the defendant's request increases, a lesser showing of materiality will suffice to establish a violation. Conversely, as the defendant's request becomes more general or even nonexistent, a greater showing of materiality is required to establish a *Brady* violation." *Smith v. Secretary Dept. of Corrections*, 50 F.3d 801, 827 (10th Cir. 1995).

Moreover, in cases where the prosecution's case depends heavily on the reliability or credibility of a single witness, as did the state's case against Wilson, evidence that would tend to impeach that witness's testimony is material and due process requires its disclosure. *Giglio v. United States*, 92 S.Ct. 763 (1972); *Moore v. Kemp*, 809 F.2d 702, 719 (11th Cir. 1987).

As noted earlier, without White's testimony, the state had no case against Betty Wilson or Peggy Lowe. The state recognized White's importance in its plea agreement with White when it stated that the "capital murder charge against BETTY WOODS WILSON and PEGGY JOY LOWE would, of necessity, have to be dismissed in absence of this agreement and the testimony and cooperation of James Dennison White." *Wilson* at 485.

White's importance to the state's case, and the resulting materiality of the suppressed notes, were accurately described by Justice Maddox in his dissenting opinion:

> [T]here can be little question that Dr. Maier's notes were favorable to the defense. White was the prosecution's star witness; Wilson could not be

> convicted of capital murder without this witness's testimony. The statement by White to Dr. Maier that he committed the crime between 6:00 and 6:30 p.m. is favorable to the defense, because it is undisputed that both Wilson and the prosecution presented evidence of her whereabouts at this time, thus giving her an alibi. In addition, this evidence could have been used by Wilson to impeach White's trial testimony.

Wilson at 492 (emphasis added).

White was the only witness who testified regarding the time and manner of the murder, and was the only witness who claimed to have knowledge that Wilson participated in his criminal acts. White's statement to Dr. Maier regarding when the murder occurred, and when he was allegedly "picked up" by Wilson, differed by one to one and one-half hours from the times given for those same events in the time line relied on by the state. Further, the undisputed evidence placed Wilson in two different locations between 6:00 and 6:30 p.m., both of which were miles away from the scene of the crime. In sum, the suppressed notes contained evidence that demonstrated that Wilson simply could not have participated in the crime.

This Court is urged to consider Justice Maddox's observation that "evidence that not only would corroborate Wilson's evidence that she did not participate in the murder, but also would contradict some of White's trial testimony (which is consistent with White's recantation testimony that Wilson was not guilty) would be relevant and material on the issue of Wilson's guilt." *Wilson* at 485. Because they established that the murder and White's flight from the scene took place at a time when it was impossible for Wilson to have been present, the notes were substantial evidence that Wilson was innocent. Further, the notes would have been very useful impeachment evidence against White, the state's key witness. As a result, the notes were material, and their absence undermines confidence in the verdict reached in this case.

A case with very similar facts is *Perdomo v. United States*, 929 F.2d 967 (3rd Cir. 1991). In *Perdomo*, the defense made a specific request for any information relating to the criminal background of any of the prosecution's witnesses. Id. at 968. The prosecution incorrectly responded that its key witness, Soto, did not have a criminal record. Id. at 969. The government sought to avoid the consequence of its error by arguing that it could not be responsible for withholding *Brady* information because it had conducted a NCIC check which did not reveal Soto's criminal record. Id. However, the witness's record was contained in the local Virgin Island files which were not recorded in the NCIC database. Id.

The trial court denied the appellant's motion for a new trial and ruled that the jury had an opportunity to evaluate the informant's credibility from other damaging testimony that had been elicited during trial concerning his receipt of Government payments and his prior drug usage. Id. The trial court also found that the government had not suppressed Soto's prior record and that the prosecution's failure to learn of the record could not in any way be determined to be a material suppression of exculpatory evidence. Id. In addition, the trial court charged the Office of the Public Defender with knowledge of Soto's prior criminal record because that office had represented Soto in a prior criminal proceeding. Id.

On appeal, the appellant presented evidence of another case where Soto also acted as a testifying informant. Id. at 972. "In a case arising out of an unrelated incident, but with a factual setting quite similar to the case at hand, Jose Rosario was acquitted of charges arising from another Narcotics Strike Force operation that involved the same Hector Soto." Id. In Rosario's case, the defense had been provided with Soto's criminal record, and at trial, his attorney was able to use that evidence to impeach Soto's testimony. Id.

The Third Circuit held that the prosecution should have known about the prior arrest and conviction because the information was "readily available" to it. Id. at 970-71. The court noted that by searching only the NCIC database, the prosecutors ignored the very records likely to reveal germane information. Id. at 970-71. The court then went on to hold that the evidence was material and that the appellant was entitled to a new trial. In so holding, the court stated:

> The district court did not apply the correct standard for measuring materiality at the sentencing hearing. The court reasoned that the undisclosed information was not material because the jury had ample opportunity to evaluate Soto's credibility due to other damaging testimony that had been elicited concerning the government payments to Soto and his prior drug usage. Whether the jury has had an opportunity to consider other impeachment evidence is not the correct standard for determining materiality of undisclosed information. It is well-established that "impeachment evidence as well as exculpatory evidence falls within the *Brady* rule." *Bagley*, 105 S.Ct. at 3380 (citing *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 766, 31 L.ED.2d 104 (1972)). "Such evidence is evidence favorable [and material] to the accused so that, if disclosed and used effectively, it may make the difference between conviction

> and acquittal." Id. In addition, a defendant is not required to show that evidence, if disclosed, probably would have resulted in acquittal. The Supreme Court has offered the following explanation:
>
> [I]f the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice. *Bagley*, 105 S.Ct. at 3883. The question is, therefore, whether the testimony that the defense would have been able to elicit would have been different had counsel known of Soto's criminal record beforehand.

Id. at 972.

As in *Perdomo*, Wilson's conviction was based almost exclusively on the testimony of a key witness. Defense counsel made a specific request for information related to that witness which was not supplied by the prosecution. Wilson was convicted and the suppressed evidence was discovered shortly after her conviction. As in *Perdomo* another trial was held (Peggy Lowe's), except this trial was tried with essentially the same evidence. In *Perdomo*, the cases were unrelated but were based on the testimony of the same witness. In Wilson's case, the cases were both related and based on the testimony of the same witness. As in *Perdomo*, Lowe's attorneys had access to the suppressed evidence, and she was acquitted. *Wilson* at 479 and fn. 11 at 496. Finally, in *Perdomo* the trial court was ordered to grant a new trial. Wilson's case should have the same result.

The most important fact that the district court and Court of Appeals failed to consider on the issue of materiality is that Peggy Lowe was acquitted. The state conceded in its plea bargain with White that neither Wilson nor Lowe could be convicted without White's testimony. Wilson's attorneys did not have Dr. Maier's notes. As a result of the state's suppression, Wilson was convicted, and she is serving a sentence of life without parole. Lowe had the exculpatory notes. She was acquitted. Why? Because Lowe's attorneys had the exculpatory notes that were not given to Wilson's lawyers.

Another important factor that the lower courts failed to consider on materiality is that there are four state appellate judges, each of whom is noted for his judicial restraint, that have substantial questions concerning the *Brady* issue. Judge Patterson believed that the state failed to meets its burden of corroborating White's testimony as required by law. Justices Maddox, See, and Butts of the Supreme Court of Alabama all believed that Wilson has a viable claim of a *Brady* violation. Further, it is clear from Justice Maddox's dissent that materiality should be decided in Wilson's favor. In addition, Judge Pointer took the extremely rare step of granting Wilson a certificate of appealability on the *Brady* issue. It is respectfully submitted that those factors are red flags that should undermine this Court's confidence in the outcome of Wilson's trial.

CONCLUSION

Based upon the facts and case law contained in the foregoing petition, Wilson prays that this Honorable Court will:

1) **grant her petition for the writ of certiorari;**
2) **reverse the decision of the Eleventh Circuit Court of Appeals; and**
3) **order that court to issue an order to the district court to grant Wilson's petition for the writ of habeas corpus.**

Respectfully Submitted,

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② FILED

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In The
Supreme Court of the United States

BETTY WOODS WILSON,
Petitioner,

vs.

MICHAEL W. HALEY, Commissioner,
Alabama Department of Corrections, et al.,
Respondents

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

Appendix To
PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 1996-97

1941212

Ex parte Betty Woods WILSON.
PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re Betty Woods Wilson
v.
State [Two Cases]).

(Tuscaloosa Circuit Court, CC-92-1893 and CC-92-1893.60;
Court of Criminal Appeals, CR-92-1223 and CR-93-2132)

PER CURIAM.

CR-92-1223--- AFFIRMED (as to the appeal from conviction); no opinion..

CR-93-2132--- WRIT QUASHED AS IMPROVIDENTLY GRANTED (as to the denial of the Rule 32, Ala.R.Crim.P., petition).

HOOPER, C.J., and ALMON, SHORES, * HOUSTON, and KENNEDY, JJ., concur.

MADDOX* and BUTTS, ** JJ., dissent.

INGRAM, J., recuses.

*Justices Maddox and Shores did not sit at oral arguments, but they have viewed the videotape of the oral arguments.

**Justice Butts did not sit for oral arguments; he listened to the tapes of the oral arguments on January 5, 1996.

1941212

Ex parte Betty Woods Wilson

Maddox, Justice (dissenting).

The majority quashes the writ. Therefore, the judgments of the Court of Criminal Appeals in Betty Woods Wilson's appeal from her judgment of conviction (CR-92-1223) and in her post-conviction Rule 32, Ala. R.Crim.App., petition (CR-93-2132) are affirmed. After reviewing the record and considering the briefs and the oral arguments of the parties, I agree with the majority that the writ is due to be quashed in the case involving Wilson's judgment of conviction; however, I believe that the judgment denying her Rule 32 petition should not be affirmed or reversed, but that the cause should be remanded to the trial court, with directions for further consideration. In this dissent I will list the principles of law that I believe are controlling and why I reach the conclusion that I do regarding her post-conviction claims.

Betty Woods Wilson was convicted of capital murder for hiring James Dennison White to kill her husband, Dr. Jack W. Wilson. The murder was made capital because it was allegedly "done for pecuniary or other valuable consideration or pursuant to a contract for hire." § 13A-5-40(a)(7), Ala.Code 1975. Wilson waived the jury's participation in the sentencing phase of her capital trial and, upon a recommendation of the State, Wilson was sentenced to life in prison without the possibility of parole. Wilson appealed the conviction to the Court of Criminal Appeals, but while that appeal was pending, she filed a petition for post-conviction relief pursuant to Rule 32, collaterally attacking her conviction and sentence, as Rule 32 permits. *Barnes v. State,* 621 So.2d 329, 332-33 (Ala.Crim.App.1992).

In her petition she requested a new trial because: (1) the prosecution had failed to disclose evidence favorable to her;[1] and (2) James White, who had pleaded guilty as the actual killer and who was the State's key witness during her trial, had recanted the testimony he gave at her trial. The trial court denied Wilson's Rule 32 petition, and entered a written order. Wilson appealed to the Court of Criminal Appeals. That Court consolidated Wilson's Rule 32 appeal with her direct appeal, and affirmed both judgments. *Wilson v. State*, 690 So.2d 449 (Ala.Crim.App.1995) (Patterson, J., dissenting). After the Court of Criminal Appeals denied her application for rehearing,[2] she petitioned this Court for certiorari review of both the judgment affirming her conviction and the judgment denying her Rule 32 petition, and this Court granted her petition.

---

[1] Wilson made the following allegations in her Rule 32 petition:

"The defendant's counsel learned for the first time in September 1993, that the State of Alabama had failed to turn over to defendant's counsel a report from the psychologist employed by the State of Alabama to evaluate James White. The report of the psychologist would have been extreamly useful in cross-examining James White during defendant's trial. The report, among other things, indicates that James White did not leave the Wilson residence until between 6:00 and 6:30 p.m. on May 22, 1992. That statement as to the time White left the Wilson residence was completely inconsistent with the other times established by the State to implicate the defendant. If White did indeed leave the Wilson home between 6:00 and 6:30 p.m., then his story that Betty Wilson picked him up at the Wilson home after the murder would have been destroyed because from 5:25 p.m. until 9:00 p.m. Betty Wilson was in the company of many people at other locations in Huntsville. The psychologist's report was based on an interview with White in August 1992, long after White had gotten his story straight. The date of the interview greatly enhanced the importance and usefulness of the report. The evidence would have been extremely damaging to the testimony of James White and the failure of the State to turn over this report to the defendant results in a denial of due process to her."

[2] Wilson filed a request, on application for rehearing in the Court of Criminal Appeals, pursuant to the provisions of Rule 39(k), Ala. R. App. P., that the Court of Criminal Appeals consider her statement of additional facts. Judge Patterson dissented from the court's denial of rehearing and listed additional reasons why he thought the court should review the additional facts stated in Wilson's motion and why he thought the rehearing should be granted. ___ So.2d at ___.

In her petition to this Court, Wilson raises the same nine issues she raised in her appeals to the Court of Criminal Appeals; these nine issues consist of six relating to errors she said occurred in her criminal trial and three she says occurred in the trial court's consideration and hearing on her Rule 32 petition.

The facts surrounding this homicide are sufficiently set out in the majority and dissenting opinions of the Court of Criminal Appeals; consequently, I state here only those facts that persuade me that Wilson has shown that she is entitled at least to have the trial court further consider her Rule 32 petition.

Dr. Jack Wilson, the defendant's husband, was found dead at his home in Huntsville on May 22, 1992. He had been stabbed twice in the chest and had been severely beaten around the head and torso. Ms. Wilson and her twin sister, Peggy Lowe, and James White were subsequently indicted for capital murder. The theory of the State's case was that Ms. Wilson and her twin sister, Peggy Lowe, had hired James White to kill Dr. Wilson so that Ms. Wilson would be free of him and would be the beneficiary of his sizable estate. The prosecutor elected to try Wilson and Lowe separately, with Wilson's case proceeding first. The prosecutor elected not to try White until he had testified in the trials of the two sisters.

White testified at Wilson's trial that he had been hired to kill Dr. Wilson for $5,000, and he implicated both Wilson and her sister, Lowe. Wilson was convicted and sentenced to life without parole. Her sister was subsequently tried and acquitted. White pleaded guilty and was sentenced to life imprisonment, with the possibility of parole.

I.

I first address Wilson's claims that the prosecution failed to turn over evidence in her trial, in violation of the principles articulated in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), a case decided *after* both the trial court and the Court of Criminal Appeals had considered Wilson's Rule 32 petition. In addressing this question, I will point out that Wilson made a pre-trial request for discovery of all records generated or maintained by the Alabama Department of Mental Health and Mental Retardation pertaining to James White, the alleged co-defendant, but that some of the requested records were not made available to Wilson before her trial.

On July 17, 1992, Wilson filed a motion styled "Motion for Discovery of Prosecution Files, Records, and Information Necessary to a Fair Trial," and she subsequently, on July 30, 1992, filed a motion styled "Motion for Discovery of Institutional Records and Files Necessary to a Fair Trial." That July 30 motion read, in part, as follows:

> "COMES NOW Defendant, by and through her undersigned attorneys, and respectfully moves this Honorable Court, pursuant to Rule 16 of the Alabama Rules of Criminal Procedure; applicable State law; the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Alabama State Constitution, to order the production of the materials specified below. Defendant additionally relies on *Ex parte Monk*, 557 So.2d 832 (Ala.1989), in which the Alabama Supreme Court held that capital cases are 'sufficiently different to justify broadened discovery.'
>
> "Defendant requests that this Court order the individuals named below to produce for inspection and

copying the documents specified herein, wherever such documents may be located, with such production to be arranged within thirty (30) days after discovery is ordered."

In this motion Wilson asked for several documents, but the documents that are the specific subject of Wilson's Rule 32 petition were described in the motion as follows:

> "6. All records generated or maintained by the Alabama Department of Mental Health and Mental Retardation and pertaining to the Defendant, codefendant or accomplice;
>
> "7. All records pertaining to Defendant, codefendant or accomplice and generated by the Taylor Hardin Secure Medical Facility, Tuscaloosa, Alabama;
>
> "....
>
> "10. Any and all medical, psychological, psychiatric or mental examinations or evaluations relating to the Defendant, James Dennison White, a/k/a James Dennison Howell, that [have been] or will be performed by any State or governmental agency."

It is undisputed that Wilson, on August 11, 1992, filed a motion styled "MOTION TO EXPEDITE MOTIONS FILED AND REQUEST TO ALLOW DEFENDANT TO HAVE A DICTAPHONE IN HER JAIL CELL," in which she specifically asked, in part:

> "that the Court expedite its decisions on the following motions: ... Motion for Discovery of Institutional Records and Files Necessary to a Fair Trial."

She alleged, in part:

> "4. For each day the Defendant is denied her constitutional right to participate and prepare her defense, she is losing a day of valuable time to prepare her trial and participate in her own defense."

On February 1, 1993, Wilson filed another motion styled "MOTION TO EXPEDITE MOTIONS FILED," in which she stated, in part:

> "COMES NOW the Defendant, Betty Woods Wilson, by and through her attorney of record, and moves this Court to expedite its decisions on the following motions: ... 13. Motion for Discovery of Institutional Records and Files Necessary to A Fair Trial filed July 30, 1992 ..."

Based on the foregoing, it appears to me that Wilson filed sufficient requests to get the institutional records regarding White.

The facts surrounding the legal issue presented in this case are not seriously disputed. In fact, many of the facts were included in a stipulation that is a part of the record. The facts show that after James White was indicted, his defense attorney made a pre-trial motion to have him examined to determine his competency to stand trial on the capital murder charge. Because White was found to be indigent, the trial judge ordered that a psychiatric evaluation be performed on him at the State's expense. In August 1992, Dr. Lawrence Maier, who was under contract with the Department of Mental Health and Mental Retardation, examined White at the Taylor Hardin Secure Medical Facility ("Taylor Hardin"). Of some significance in this case is the fact that Dr. Maier's evaluation report was made of White *after* White had given seven statements to State agents, in which he had stated to the police many of the facts surrounding the homicide, *but had not stated the time of the homicide.*

During his examination of White, Dr. Maier made handwritten notes of information he obtained in the interview, including facts relating to the capital murder charges then pending against White, Wilson, and Lowe. Immediately following the interview, Dr. Maier prepared an initial competency evaluation report, and the supplemental notes that he later filed are the subject of this proceeding.

Why does Wilson claim that the notes were material? At her trial, her counsel questioned White about inconsistencies between his trial testimony and statements he had previously given to the police, *including statements relating to the time the murder occurred.* Regarding the time of the homicide, White testified that he could not recall any exact times, including the time of the murder, because, he said, he did not carry a watch and he was suffering from blackouts. According to Dr. Maier's notes, however, White told him that he committed the murder between 6:00 and 6:30 p.m.

After examining White, Dr. Maier determined that White was mentally competent to stand trial, and he filed his report at Taylor Hardin and furnished copies to the prosecution, to White's attorney, and to the trial court, but Dr. Maier did not file the handwritten notes or a transcription of them at that time; rather he took the notes with him and later had them transcribed, after which he sent a copy of them to Taylor Hardin, where, as was required, the notes were attached to the initial evaluation report that he had previously prepared. It was the State's failure to produce these notes, in which Dr. Maier stated that White had told him that the murder occurred between 6:00 and 6:30 p.m., that forms the basis of Wilson's claim that her constitutional rights were violated and that she is, therefore, entitled to a new trial.

For a better understanding of Wilson's constitutional claim, I state some of the basic facts relating to the notes, their content, and their relevance insofar as Wilson's trial is concerned.

After White was examined by Dr. Maier, the trial court held a hearing to determine White's competency to stand trial. The trial judge determined that White was mentally competent to stand trial, as Dr. Maier had concluded in his evaluation; however, before White's trial, and before Wilson's trial, White entered into a four-page contingent plea agreement with the prosecutor, wherein White agreed to provide "truthful and complete corroborating evidence ... substantiating the complicity and involvement" of Wilson and her twin sister, Lowe, in the murder of Dr. Wilson. The prosecution, in turn, agreed to recommend, after Wilson and Lowe were tried, that White be allowed to plead guilty to the offense of murder (a lesser included offense of capital murder) and be sentenced to life imprisonment. Stated differently, the substance of the agreement was that if White would testify against Wilson and Lowe, he would not face execution, or, for that matter, a sentence to life imprisonment without parole, for his part in the murder of Dr. White, but would instead receive only a life sentence with the possibility of parole.

The basic facts surrounding the preparation and filing of the handwritten notes are not disputed. In fact, at the Rule 32 proceeding, the parties entered into the following stipulation of facts regarding the notes taken by Dr. Maier:

> "1. Dr. Lawrence R. Maier was appointed to do a mental competency evaluation of James Dennison White. Dr. M[illegible] is regularly employed on a contract basis by the Alabama Department of Mental Health and Mental Retardation to evaluate all criminal defendants where there is a question as to their mental competency. Dr. Maier is employed to work in the Huntsville, Alabama, area. Maier's evaluation of White was the result of action

taken by White's attorney, Roy Miller. The request by Miller for the evaluation was made in the case of *State of Alabama v. James Dennison White*, CC-92-1193-FJ. The evaluation was ordered by Judge Jeri Blankenship on July 14, 1992.

"2. On August 5, 1992, Dr. Maier interviewed James Dennison White. Thereafter, Dr. Maier filed a formal report with the District Attorney of Madison County, Alabama, with Judge Blankenship, and with Roy Miller.

"3. Prior to the trial of Betty Woods Wilson for capital murder, the report prepared by Dr. Maier was supplied to [one of] Betty Woods Wilson's lawyers, namely, Marc Sandlin, by Assistant District Attorney Susan T. Moquin, pursuant to an order by Judge Thomas Younger.

"4. It is the practice of Dr. Maier to cause his notes to be transcribed and typed. Dr. Maier's notes, taken during the interview of James Dennison White, were typed up into a three page document entitled 'Additional Information Section.' These transcribed notes were sent by Dr. Maier to Taylor Hardin Secure Medical Facility as required of him by of the Department of Mental Health and Mental Retardation. However, the notes were not supplied to the District Attorney of Madison County, Alabama, to the Assistant District Attorney involved, to Judge Blankenship, to Roy Miller, or to [the] prosecutor, James Fry. The notes ... were not supplied to Betty Wilson's lawyers prior to her trial."

The parties also stipulated that neither Wilson nor her attorneys knew of the existence of the notes until they were handed over to them by Lowe's attorneys on a date *after* Wilson was tried.[3] In addition, the parties orally stipulated that no member of the prosecution nor any member of the police force had had any knowledge of the existence of the transcribed notes.

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[3] In her petition, Wilson claimed that this date was in September 1993. The record shows that Lowe's attorneys were given not only the

In White's own case, a different trial judge than the one who tried Wilson's case had directed that White be evaluated by a psychiatrist at the State's expense, and had ordered that White "undergo examination by a Certified Forensic Examiner appointed by the Alabama Department of Mental Health and Mental Retardation," to "be conducted on an outpatient basis by Taylor Hardin Secure Medical Facility or regional outpatient program under contract to the Alabama Department of Mental Health and Mental Retardation." This order was entered on July 14, 1992, in James White's case by Circuit Judge Jeri Blankenship. This order was entered three weeks before Wilson's discovery motion was filed.

On September 2, 1992, the trial judge in Wilson's case entered an order, which I attach as Appendix A, in which he ordered the prosecution to turn over certain items of evidence, stating that the prosecution was required to turn over the requested evidence pursuant to the discovery provisions of Rule 16, Ala. R.Crim. P. It is not absolutely clear from the record, however, whether this September 2, 1992, order was entered as a result of the "Motion for Discovery of Prosecution Files, Records and Information Necessary to a Fair Trial" filed July 17, 1992, or was entered as a result of the "Motion for Discovery of Institutional Records and Files Necessary to a Fair Trial" that Wilson had filed on July 30, 1992. In any event, it is clear that the latter motion was specific enough to include not only the evaluation report that Dr. Maier had done, but his notes as well, which it appears were a part of White's file at the time

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evaluation of White, but also the supplemental notes; however, this occurred after Wilson had been tried.

the motion was filed. (*See,* Paragraphs 6, 7, and 10 of the "Motion for Discovery of Institutional Records and Files Necessary to a Fair Trial," quoted above, 690 So.2d at 479-80.)

In his September 2, 1992, order, the trial judge directed the prosecution to turn over documents that were "known to exist or which with due diligence could be determined to exist, and to allow the attorneys [for Wilson] to inspect, test, examine, photograph or copy the same."

Even though the trial judge entered the order on September 2, 1992, and even though Wilson had asked in her motion seeking the institutional files that "such production ... be arranged within thirty (30) days after discovery is ordered," the record shows that the prosecution did not turn over to Wilson's attorneys the evaluation report by Dr. Maier until February 5, 1993, which was 5 months after the order was entered and only 16 days before the commencement of the trial, and only after Wilson's attorneys had on February 1, 1993, filed a "Motion to Expedite Motions Filed." A copy of that Motion is attached as Appendix B.

I cannot tell from the record before this Court the exact date when the prosecution turned over the requested documents; nor can I determine whether the evaluation report that was given to defense counsel was the one sent to the prosecution in White's case, or whether the prosecution obtained the evaluation report from Taylor Hardin to comply with Wilson's request for the institutional files generated or maintained by Taylor Hardin. In any event, the parties stipulated that Dr. Maier's notes were not produced to Wilson before her trial and that she found out about the notes when attorneys for Peggy Lowe, in Peggy Lowe's case, were given a copy of the notes.

Although I do not know the specific purpose Wilson had in mind for requesting the documents pertaining to Dr. Maier's evaluation of White, one can assume that Wilson wanted to get as much background information as possible on White's past behavior and possible mental problems so that she could discredit him and any testimony he might give.[4]

Relevant to the instant inquiry, of course, is the fact that Dr. Maier's notes included a statement made by White in which White admitted that he had committed the murder sometime between *6:00 and 6:30 p.m.* In none of the seven statements that White gave to police *before he was evaluated by Dr. Maier* did he state that the murder had occurred between 6:00 and 6:30 p.m. In fact, as I have stated earlier, White testified at Wilson's trial that *he could not recall any exact times, including the time of the murder,* because, he said, he did not carry a watch and he was suffering from blackouts.

According to Wilson, the time of the actual commission of the crime was significant to her defense because she presented evidence of her whereabouts between 5:25 p.m. and 8:00 p.m. It appears that an important component of the prosecution's case was the establishment of a time line that would prove that the defendant Betty Wilson had the opportunity to participate in the murder of her husband. The prosecution presented evidence to establish this time line:

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[4] The record shows that Wilson requested that the trial court issue a *subpoena duces tecum* to each of approximately 16 private medical institutions and physicians, because White's attorney had "made public statements relating to his client's history of substance abuse, his extended history of mental illness, and his client's extended history of medical treatment." In asking the trial court to issue these subpoenas, Wilson argued that "there is a reasonable likelihood that the [medical] records in question will disclose material information or evidence of substantial value with respect to ... [White's] competency to testify, history of delusions and/or fantasies." Wilson's motion appears to have made clear the type of information she wanted produced and why she wanted it produced.

(1) through the testimony of several witnesses who stated that they saw Wilson on the day of the murder; and (2) by the introduction of business records that showed where and when Wilson had made purchases that day. In his seven statements to the police before he was evaluated by Dr. Maier, and at trial, White stated that he could not recall any exact times, including the time of the murder, because, he said, he did not carry a watch and he was suffering from blackouts. A review of the record shows that specific times that appeared to be important to the prosecution included the time that Wilson allegedly picked up White at a shopping mall, the time of day the murder was committed, and the time that Wilson allegedly picked up White at her home.

The State contended at Wilson's trial that the time-line evidence corroborated White's trial testimony and gave Wilson the opportunity to participate in the murder. In any event, the evidence of Wilson's whereabouts on the day of the murder was a substantial part of the State's case and of Wilson's defense. The prosecution's theory of the case was that Wilson had the opportunity to take White to her home between 2:15 p.m. and 3 p.m., and that Wilson could have picked up White only between 4:50 and 5:25 p.m., because business records tended to confirm that she made her last purchase at 4:49 p.m. and witnesses accounted for her whereabouts after 5:25 p.m. the day of the murder. Wilson claims that she was at the mall most of the afternoon of the day of the murder, leaving briefly to go to a tanning booth and returning thereafter.

The prosecution's theory of the time line and its importance is shown by the closing arguments made by the prosecution to the trial jury, where the prosecutor stated:

> "Well, that moves us up to the next day. Moves us up to the 22nd of May. How do we know where the defendant was and how do we know where James was?

Well, I put myself something together called 'Where is Betty? Where is James?' And you all, do the same thing with all the notes I saw you taking. Because we know from the cash register receipt that she was at Yielding's that day and bought some shoes, which you all saw ... but bought a pair of shoes like some flowery Keds, which we had here but did not go into evidence. She bought those shoes there. Same shoes, by the way, that later on [N.N.] and I believe some other people said she had on, that they saw her with those Keds. Well, James White described those shoes for you. How did he know? Oh, well, he was stalking. That's what you are going to hear, he was stalking. Why? Why? He didn't even know the woman. Talked to her on the telephone. Unless he is telling the truth. He described those shoes for you.

"You know where she went next, the tanning salon, after dropping James off at about 2:30, between 2:10 and 2:30. And by the way you will have the map. You have got the scale. From Parkway City Mall, right here, up to their home on Boulder Circle here. And Trey told you himself, he told you himself, less than five minutes, four or five minutes, just a short little hop, skip, and a jump. Could have been there by 2:15, 2:20, if she left after she made the purchase, and James was in the house.

"And then you know the rest of the places that she went that afternoon. We have documented that for you. We established everywhere we know she went, including, according to Micky Brantley, who said the defendant told him that she went to the bank that afternoon. In fact, her excuse, as I recall the testimony, was for taking--for going back home, where she forgot the bank bag.

"And what else did he tell you? Told you that when she came back, when he got in the back seat of the car, he covered himself with some plastic bags that seemed to have some clothes in them. And what color did he say the one that was in his face was? He said that it was pink. How did he know? How could he have known? How could he have guessed pink? How could he have guessed clothing bags? Because he was there, because it was in his face. You remember?

"You will remember Peggy Black told you that when the defendant came by the Morgan headquarters that night, that she had a bank bag with her, and she told her once or twice or several times that they would be back in the morning, they were going on a trip, that she would come back in the morning and give her the deposit slips. Wait a minute, wait a minute. She already made the deposit, she had made the deposit. What was this all about? Why did she tell her that? She had made the deposit. The deposit slip, apparently, was in the bag. What was this nonsense about coming back? Why didn't she just give the thing to Peggy Black then? Could it have been that she was establishing being somewhere at 4:30--or, rather, 5:30, 5:45?

"Part of the instructions of law which I think the judge is going to give you ... is about corroborating evidence and connecting the defendant with the crime. We have got to connect her, at least by implication, with the crime. And one of the ways you can do that is to establish the defendant's closeness to the crime itself. Sheila Irby does that. You remember Sheila Irby? Sheila Irby was the lady who was taking her daughter to play softball, and she was making trips back and forth, and she had gone back and calculated the time it was that she had to be at the ballpark, the time she got there, the time she left the mall. You all heard the testimony. But it was her testimony that she saw James White on the street at, I believe, 5 'til 5:00, 10 'til, something like that, but right at 5 o'clock. She went home, got her girls, made a trip, came back, and by her testimony no later than 5:10, if I remember correctly, she saw the defendant on this case heading toward Boulder Circle. Not on Boulder Circle, on Chandler Street, but headed towards Boulder Circle where she lived. That's exactly where James White tells you he was picked up. That's exactly the neighborhood where the murder occurred. It puts her there with White ar at least within 10 minutes of it."

On the other hand, defense counsel Jack Drake argued that White was not credible and that the murder could not have happened as claimed by the prosecution:

> "Let's look at some of the specific answers to what James White says. He says that he was over there on Boulder Circle between--well, actually these are specific answers to his whereabouts and what the State says about him and Betty. Andy Sieja, the little 13-year-old boy--remember him--came in here in this place and appeared not to even be scared. I thought he was going to be scared to death. He was out there in the circle from somewhere right after 3 o'clock, when he got home, on up to about 5:15. He was out there playing, he and two friends. They didn't see Betty. They didn't see Betty. They didn't see Betty bring James White over there and pick him up. They didn't see it because it didn't happen.
>
> "Mrs. _________ [a witness], who doesn't even live on the circle, lives somewhere else, says she saw Betty in the area in her car. She didn't say it initially, she only said it after things really got going in the newspapers. I think you can explain [that witness's] conduct and her testimony in several ways. One, she is mistaken, the other is that maybe she is a dingbat. And y'all can make the choice.

"We know that David Williamson saw James White over in the Ramada Inn and had a confrontation with him, a violent confrontation, saw him at the bar at 5:15. James White says he was in the house for several hours. He wasn't in the house, we know that now.

"Dr. Wilson came home about 4 o'clock, he went out and drove a stake in the front yard, these boys saw him. He was alive at 4:30. James White wasn't in the house, it didn't happen that way.

"And we have this note, the note that everybody says Dr. Wilson wrote. Now, Jimmy Fry started out saying this 2 was a 3. It's a 2, you can see it when we blow it up. I mean, there is no question about it. It's 1715, 22 May. It appears that he wrote down the time and the date and had some things to do. Now, could this be a mistake, could he have done it on the wrong day or something? No. Critical little piece of information right there. 'Mr. Hyde,' and he marked it through. He called Mr. Hyde, that's the message on the answering machine where he told him to bring that piece of equipment over to my office--I'm sorry, I never understood what this thing was, bring something to my office and get the key from the pharmacy so you can get into the office. Remember that?

"He was alive at 5:15, no surprise, because James White was over at the Ramada Inn getting tanked up on alcohol and taking fast ones, getting ready to do something."

Later, defense counsel Bobby Lee Cook argued:

> "You heard James White for over a day. And there is one--we had the court reporter to transcribe everything that he said. There is one statement that he made that I have no problem disagreeing with. And the question was, 'When did you start telling the truth?' And he said, and I quote, Mr. Fry, 'I can't remember exactly what day it was, what day it was that I started.' In these two documents, which represent his testimony in this case, he has admitted to lying under oath 58 times."

Unquestionably, White's testimony that implicated Wilson was critical to the prosecution's case. In fact, in the plea agreement with James White, the prosecution admits that the "capital murder charges against BETTY WOODS WILSON and PEGGY JOY WOODS LOWE would, of necessity, have to be dismissed in absence of this agreement and the testimony and cooperation of JAMES DENNISON WHITE." Consequently, evidence that not only would corroborate Wilson's evidence that she did not participate in the murder, but also would contradict some of White's trial testimony (which is consistent with White's recantation testimony that Wilson was not guilty) would be relevant and material on the issue of Wilson's guilt.

Evidence relating to the credibility of White was highly relevant because White was an accomplice, whose testimony, as a matter of law, had to be corroborated, and at least one Judge on the Court of Criminal Appeals was of the opinion that the State failed to meet its burden of corroborating White's testimony, as required by law.[5] Although I do not agree that Wilson was entitled to a judgment of acquittal as stated by the dissenting Judge on the Court of Criminal Appeals, the record does show that, during a two month period following his initial arrest, White gave seven separate statements concerning his role in Dr. Wilson's murder and in some of those statements changed his story in relation to many aspects of the crime; however, in his statement of the facts that he gave to Dr. Maier, at a time *after* he had given the seven statements, White was very specific about the time when he left the Wilson house after the homicide.

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[5] In his dissenting opinion, Judge Patterson stated: "I am compelled to dissent because I do not believe that the prosecution's evidence independent of White's testimony corroborated White's testimony, and thus I believe that [the prosecution] did not meet the requirements of § 12-21-222 [Ala. Code 1975]. It is my opinion that the trial court's ruling denying Wilson's motion for judgment of acquittal constituted reversible error." ___So. 2d at ___.

There were many inconsistencies in White's statements. For example, White said in his first five statements that he had met Wilson and Lowe at Logan Martin Dam on Tuesday, May 19. This was inconsistent with his trial testimony that he had met them at the dam on Wednesday, May 20. Additionally, White gave three different accounts of what happened after he committed the murder. Initially, he stated that he left the Wilson home by cutting through the woods behind the house to a roadway where he had left his truck; later, he claimed that he had waited inside the house until Wilson returned home to pick him up. At trial, however, he testified that he did not remember what he did immediately after killing Dr. Wilson, and that his first recollection after the murder was sitting in the woods, where he said he waited until Wilson returned home.

At her Rule 32 hearing, Wilson called White as a witness to give oral testimony, but White, who had executed a recantation affidavit, refused to testify, claiming his Fifth Amendment privilege against self-incrimination. The record shows that the State's position regarding White's invocation of the Fifth Amendment privilege was that White should be allowed to invoke his privilege not to incriminate himself. The trial judge, after initially stating to White when he invoked his Fifth Amendment privilege that "[y]ou have no right to invoke the Fifth Amendment in this matter and you are directed to testify," nevertheless later agreed with the State's position on the issue and refused to require White to testify. Consequently, Wilson was not permitted to ask White questions relating to his trial testimony that had implicated her or to question him about the statement he had made to Dr. Maier relating to the time that the murder occurred, and further delve into the inconsistencies between what he told the police and what he told Dr. Maier.

Based on the above-mentioned facts, Wilson claims she should be granted a new trial. She says it is clear that the prosecution failed to turn over exculpatory evidence in the State's possession, in violation of Rule 16, Ala. R.Crim. P., and in violation of the principles of law set forth in *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Kyles v. Whitley,* 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

I was almost persuaded to agree with Wilson's argument that she had shown sufficiently her entitlement to a new trial, but there are a number of facts relating to her pre-trial "Motion for Discovery of Institutional Records and Files Necessary to a Fair Trial" that are not clear, and the trial judge's ruling in his final order denying Wilson's Rule 32 petition--that "[h]ad [Dr. Maier's] notes been requested they could have been produced by Dr. Maier either voluntarily or by court order"--needs clarifying. I do not fully understand the basis for that portion of the trial judge's order denying Wilson's Rule 32 petition, where the trial judge specifically stated the following about Dr. Maier's notes:

> "Finally, as to the issue concerning 'additional notes,' it is clear that the evidence is not newly discovered. By stipulation and the testimony of Petitioner's attorney, Mr. Charles Hooper, it is clear that White's evaluation report was important to the defense. They requested and received a copy of the evaluation containing references to the dates and times White was interviewed by Dr. Maier. They were on notice that Dr. Maier had interviewed White in compiling his evaluation and should have anticipated that he took notes during the interview. Witness Hooper testified that he spoke with Dr. Maier prior to trial. *Had the notes been requested they could have been produced by Dr. Maier either voluntarily or by court order.*"

(Emphasis added.) I do not understand why the trial judge found that Wilson did not request Dr. Maier's notes. My review of the record suggests that Wilson filed a *specific* request before trial and requested production of institutional records that contained Dr. Maier's notes. One of the reasons why I would remand the case is to give the trial judge an opportunity to clarify his finding and to answer these specific questions:

1. When were Dr. Maier's notes ("Additional Information Section") made a part of the "records generally maintained by the Alabama Department of Mental Health and Mental Retardation and pertaining to [White]"?

2. To which motion did the September 2, 1992, order refer?

3. What specific records were produced for the defendant, Betty Wilson, as ordered by the trial court on September 2, 1992, and on what dates were those records produced? List the specific records produced.

4. What action, if any, did the trial court take in response to Wilson's discovery request styled "Motion for Discovery of Institutional Records and Files Necessary to a Fair Trial," and when was that action taken? If no action was taken, why was no action taken, in view of the motions to expedite?

5. What action did the trial court take in response to Wilson's motion styled "Motion to Expedite Discovery Request"?

I regret that the majority will not at least agree to remand the post-conviction petition to the trial court, because I believe that the answers to these questions are necessary for an adequate evaluation of Wilson's *Brady* and *Kyles* claim.

In addition to the above, I believe that the trial judge correctly stated initially that White was not permitted to invoke his Fifth Amendment privilege against self-incrimination, but then erroneously changed his ruling after argument by the State. When White invoked the Fifth Amendment privilege, he had given an affidavit that contradicted his trial testimony.[6] An affidavit is a statement signed under oath in the presence of a witness and sealed by a notary. Statements contained in an affidavit, if shown to be false, can subject the declarant to a criminal prosecution for perjury. *See, Singleton v. State,* 29 Ala.App. 303, 195 So. 459 (1940). In any event, "[a] witness who discloses a fact or transaction without invoking his privilege against self incrimination is deemed to waive that privilege with respect to that fact or transaction." *F.W.P. v. State Department of Human Resources,* 606 So.2d 153, 155 (Ala.Civ.App.1992). As the United States Supreme Court stated in *Hoffman v. United States,* 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951):

> "To sustain the privilege [against self-incrimination], it need only be evident from the implications of the question, in the setting in which it was asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

341 U.S. at 486-87, 71 S.Ct. at 818. *See, Ex parte Baugh,* 530 So.2d 238 (Ala.1988).

In support of its conclusion that White had not waived his privilege, the Court of Criminal Appeals cited *Pennington v. State,* 420 So.2d 845 (Ala.Crim.App.1982), but I find that case to be distinguishable. In *Pennington,* the court stated that "[i]ndividuals who testify in either civil or criminal proceedings have the right to refuse to answer relevant questions *where the answers might tend to incriminate them in future proceedings.*" 420 So.2d at 849. (Emphasis added.) *Pennington*, therefore, stands for the proposition that a witness cannot be compelled to testify when the answers might be used to incriminate the witness, but that case does not address the question presented here--whether a waiver had already occurred, before the witness was called to testify.[7]

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[6] The record shows that initially the trial judge was of the opinion that White could not claim the privilege.

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[7] The record shows that the following occurred at the Rule 32 hearing:

"THE COURT: All right. Mr. White, your motion to appoint counsel is denied. Stand and raise your right hand.

"(Whereupon the witness was sworn.)

"MR. WHITE: But the defendant also claims his Fifth Amendment rights.

"THE COURT: That's another matter to which – well, I don't believe that – I believe you will be required to testify, let me put it that way. And we will proceed with the questioning, and you may oppose – I mean, you may interpose your objection as we go along and the Court will rule on it specifically as we go along, but, generally speaking, you would not be entitiled to assert Fifth Amendment rights.

"MR. WHITE: Well, not meaning no disrespect to the Court, Your Honor, but according to Rule 6 of the Alabama Code, that any criminal proceedings that may incriminate me to further prosecution, entitles me to an attorney in any type criminal proceeding.

"THE COURT: Mr. Drake, you may proceed.

"EVIDENCE ON BEHALF OF THE PETITIONER: JAMES DENNISON WHITE – being first duly sworn, was examined and testified as follows:

"DIRECT EXAMINATION BY MR. DRAKE:

"Q: Would you state your name, please?

"A: James D. White.

"Q. Are you the same James D. White who testified at the trial of Betty Wilson?

"A: I stand on my Fifth Amendment rights.

"Q: At the trial of Betty Wilson, you testified that Betty Wilson and her sister, Peggy Lowe, hired you to kill Dr. Jack Wilson. Was that testimony true or was it false?

"A: I stand on my Fifth Amendment rights.

"MR. DRAKE: Judge, I don't think he has the right to invoke it.

"THE COURT: You have no right to invoke the Fifth Amendment in this matter and you are directed to testify.

"MR. FRY [prosecutor]: Your Honor, may we be heard on that?

"THE COURT: Right.

"MR. FRY: There is one matter, I guess, the State needs to bring to the Court's attention in considering the Fifth Amendment privilege.

"Mr. White may be being put in the predicament of now admitting perjury under oath, for which he could be prosecuted, or he may be being put in the posture of giving testimony which possibly could be different materially from that which he gave at trial. And, if so, could at least arguably reopen the prosecution of his case for capital murder.

"I would like to bring that to the Court's attention in the questions regarding his testimony as it relates to perjury during the trial or conduct as it relates to a possible further prosecution of his own case.

"THE COURT: Mr. Drake?

"MR. DRAKE: Judge, I addressed that in writing in my pretrial letter brief, and it seems to me the cases are clear that --

"THE COURT: I think the cases are clear, but as to the question of perjury, I don't know that that has been answered. He does open himself up to potentially committing perjury because he is now under oath. The statement that he gave –

"MR. DRAKE: Well I think the State has waived its right to prosecute him for that in the plea agreement they entered into with him.

"MR. FRY: We are talking about now perjury at this time, not perjury in Tuscaloose [the venue of Wilson's trial]. We are talking about perjury now.

"MR. DRAKE: Well, I don't think a witness can invoke the Fifth Amendment because he wants to avoid lying. I mean, that – I don't understand how that any witness could do that. You know, you can't make me tell the truth, is essentially what Mr. Fry is arguing you can't do to Mr. White.

"MR. FRY: I'm arguing you can't make him make a statement which incriminates him in regard to a matter before the Court.

"THE COURT: That would be the case, Mr. Drake, this Court would not be able to force him to make a statement that would be incriminating, and it might very well be that telling the truth would be incriminating.

"MR. DRAKE: Well, if that were the case, any witness could make that Fifth Amendment invocation, and I don't see – the whole process of the proceeding, and any witness says "I'm not going to let you get at the truth because it would incriminate me," that would destroy the whole judicial system.

"MR. FRY: That's kind of what the Fifth Amendment is about, unfortunately for us.

"THE COURT: All right. I'm going to sustain it.

(C.R. 25-29.)

In view of the fact that I stand alone in stating that I would remand the case before affirming the judgment, I set out some of the legal principles that draw me to that conclusion.

In *Brady*, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963). The Court reasoned that this rule was necessary to ensure the public's interest in conducting fair criminal trials and guaranteeing efficient administration of justice.[8] Later, in *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Court refined its holding in *Brady*, not only by giving a definition of "materiality" in relation to a *Brady* analysis,[9] but also by making it clear that the defendant's failure to request favorable evidence did not leave the prosecution free of all obligation to disclose exculpatory evidence.[10] In *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), however, the Court abandoned the rule that the standard for determining materiality is contingent on the type of *Brady* violation involved, holding that a single standard of materiality should be applied by a reviewing court, regardless of the type of request made by the defendant for exculpatory evidence. *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383-84. In my opinion, these three cases continue to be relevant to a *Brady* violation analysis.

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[8] In support of its holding, the Court wrote, "society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87.

[9] In *Agurs* the Court held that the standard for determining materiality is dependant on the type of *Brady* violation claimed by the defendant. The three different types of situations that the Court determined could arise in a *Brady* context were: 1) where previously undisclosed evidence revealed that the prosecution introduced testimony that it knew or should have known was perjured; 2) where the prosecution failed to accede to a defense request for some specific kind of exculpatory evidence; and 3) where the prosecution failed to volunteer exculpatory evidence never requested, or requested only in a general manner. 473 U.S. at 103-106. The Court held that the failure to disclose evidence covered by the first two situations should be reviewed under a more lenient standard than the failure to volunteer exculpatory evidence that was not requested, because in the first two situations the prosecution is put on notice of the evidence, contrary to the situation where exculpatory evidence is not requested. Id. At 111-13. *See*, Terrence J. Galligan, Comment, *The Prosecutor's Duty to Disclose Exculpatory Evidence after Bagley v. United States*, 1 Geo. J.

Although these *Brady* issues mainly dealt with the proper standard for determining whether suppressed evidence is material, it is apparent from these cases that a *Brady* analysis involves more than determining whether the undisclosed evidence is material. A *Brady* violation occurs where: 1) the prosecution has suppressed or withheld evidence; 2) the evidence was favorable to the defendant; and 3) the evidence was material to the issues at trial. *United States v. Perdomo*, 929 F.2d 967 (3d Cir.1991); *Stano v. Dugger*, 901 F.2d 898 (11th Cir.1990); *Ex parte Kennedy*, 472 So.2d 1106 (Ala.1985); *McMillian v. State*, 616 So.2d 933 (Ala.Crim.App.1993). *See also, Moore v. Illinois*, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972). Therefore, in order for Wilson to prevail on her claim that her due process rights guaranteed by the United States Constitution were violated by the prosecution's failure to turn over Dr. Maier's notes, she must show that the three elements set out above are present.

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legal Ethics 213) 1987; Paul G. Nofer, Note, *Specific Requests and the Prosecutorial Duty to Disclose Evidence: The Impact of United States v. Bagley*, 1986 Duke L.J. 892 (1986).

[10] The Court in *Agurs* held that "[i]f the supression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." 427 U.S. at 110.

First, Wilson must demonstrate that the prosecution suppressed or withheld Dr. Maier's notes. Because the parties concede that the prosecution did not know of the existence of these notes until after Wilson's trial, the question whether Wilson showed that the prosecution "suppressed" this evidence requires close analysis. While a prosecutor's lack of knowledge is important to the inquiry, it has been said that a prosecutor's lack of knowledge of exculpatory evidence does not necessarily eliminate the prosecution's responsibility to disclose the evidence, because the *Brady* rule is framed in a manner that permits its application to evidence of which the prosecutor might be ignorant. *Kyles v. Whitley,* 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *Bagley* and *Agurs, supra; United States v. Brooks,* 966 F.2d 1500 (D.C.Cir.1992). Therefore, under a *Brady* and *Kyles* analysis, the prosecution may be deemed to have suppressed evidence, even though no prosecutor actually knew of the existence of the evidence until after trial. In other words, as the Court stated in *Kyles,* "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Kyles,* 514 U.S. at 419, 115 S.Ct. at 1568. *See,* John C. Lambrose, *Discovery In the Wake of* Kyles: *Don't Tack Too Close to the Wind,* 3 Nev. Law. 10 (1995); Note, *Prosecutors Must Disclose Exculpatory Information When The Net Effect of The Suppressed Evidence Makes It Reasonably Probable That Disclosure Would Have Produced A Different Result-- Kyles v. Whitley,* [514 U.S. 419] 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), 26 Seton Hall L.Rev. 832. Do the facts of this case support a *Brady* challenge? Did the prosecutor tack too close to the wind? I do not make that final determination at this time, because all the facts surrounding the failure of the State to produce Dr. Maier's notes are not in the record. Clearly, White's testimony at the Rule 32 hearing is not in the record because he successfully invoked his Fifth Amendment privilege.

Although it is admitted that the prosecution had no knowledge of Dr. Maier's notes, it seems that the notes were to be included within those documents that Wilson specifically asked to be produced. I believe that the determinative issue is: On what date were Dr. Maier's additional notes received by Taylor Hardin and made part of James White's institutional file? Why were those notes not disclosed to Wilson prior to her trial, especially in view of the fact that the stipulation of facts entered into by the prosecution and the defendant at the Rule 32 hearing stated that Dr. Maier's report was turned over "pursuant to an order [entered] by Judge Thomas Younger?" I believe that Wilson is entitled to answers to these questions.

The United States Supreme Court, in *Agurs*, stated that "when the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Agurs*, 427 U.S. at 106, 96 S.Ct. at 2399. The rationale behind this rule rests on the principle that a specific request puts the prosecution on notice of what evidence the defendant desires, thus alleviating the prosecution's burden of determining what might be, and what might not be, relevant to the defense. On the other hand, the failure of the prosecution to turn over specifically requested evidence, to which no objection is filed, could mislead the defendant into believing that the evidence does not exist. The United States Supreme Court stated in *Bagley:*

> "We agree that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption."

473 U.S. at 682-83, 105 S.Ct. at 3384.

Wilson's discovery request was styled "Motion for Discovery of *Institutional Records* and Files Necessary to a Fair Trial." (Emphasis added.) Wilson's motion seems to have been specifically directed, and the records sought seem to have been specifically identified.[11] Her motion was based not just on the provisions of Rule 16, Ala. R.Crim. P., but also on the disclosure requirements articulated in *Brady v. Maryland*. "This constitutional duty [to disclose exculpatory evidence], established by the [United States] Supreme Court's interpretation of our Constitution, was affirmative, anterior to, and weightier than the district court's [discovery] order and Rule 16 [of the Federal Rules of Criminal Procedure]." *United States v. Wood*, 57 F.3d 733, 737 (9th Cir.1995).

Under the facts of this case, where the defendant specifically sought to discover "Institutional Records and Files" of the State's chief witness, the trial court, on remand, should review its finding that had the defendant made a specific request, it would have been granted. The duty to comply with a specific request seems even more compelling because Wilson was charged with capital murder, and she cited *Ex parte Monk*, 557 So.2d 832 (Ala.1989), in support of her discovery request. In *Monk*, this Court held that the very nature of a capital case requires that in such a case the prosecution be subject to broader discovery orders than it is subject to in other cases. "The hovering death penalty is the special circumstance justifying broader discovery in capital cases." *Ex parte Monk*, 557 So.2d at 836-37.

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[11] Dr. Maier's notes were produced to attorneys who represented Peggy Lowe. I do not know the circumstances surrounding the production of the notes in that case, however. All that this record shows is that Lowe's attorneys disclosed them to Wilson's attorneys.

Furthermore, in this case, the parties stipulated that Dr. Maier was required by the Department of Mental Health and Mental Retardation to transcribe his handwritten notes and to send them to Taylor Hardin to be made part of White's mental competency evaluation. The fact that Dr. Maier was required by a State agency to perform this act strengthens the defendant's argument that the prosecution was under a duty to disclose them in this case.

The State expresses a fear that a reversal in this case would put on the State a difficult burden to produce records held by State agents of which it had no knowledge, but I do not base my dissent on that theory. Here, there was a pre-trial request for specific records held by a State agency, and even though that agency probably was not an "agent of the prosecution" within the meaning of that phrase as used in the *Brady* line of cases, I believe that the law has been, and continues to be, that when a defendant files a motion to produce specific evidence in the custody of the State, and the prosecution does not object to its disclosure, then the prosecutor has an obligation to turn over for inspection or copying specifically requested evidence that has been ordered to be produced. Many records that are discoverable under the provisions of Rule 16 do not contain exculpatory evidence. In fact, many of them contain inculpatory evidence, but that does not affect the right of a defendant to have the evidence disclosed.

Brady applies to the disclosure of exculpatory evidence, and *Brady* limits the scope of the evidence a prosecutor is under a duty to disclose; consequently, I should not be understood as saying that I would require the disclosure of records that are not covered under the *Brady* guidelines, as further interpreted in *Kyles*. This case presents a different issue: What if the State fails to produce records in the possession of a State agency when those records are material and the defendant files a motion requesting their production?

I do not believe that the Alabama Department of Mental Health and Mental Retardation was an agent of the prosecution under the facts of this case; therefore, I do not address the issue as if it were just a *Kyles* issue. Here, there was a specific request, and I believe that under the law such material should have been disclosed, and in such instances the application of the "harmless error" rule is almost negated.

In reviewing whether the principles set out in *Kyles, Bagley,* or *Agurs* apply, each case must be reviewed based on its particular facts. In *Kyles, Bagley,* and *Agurs* the United States Supreme Court held that the prosecutorial authorities were considered to have had knowledge of facts that were known to law enforcement officers, who were considered to be agents of the prosecution in those cases. There could be other cases where the prosecution, as here, does not know of the exculpatory evidence until after the trial. A reviewing court must independently determine whether the prosecution should be held responsible for its failure to produce the exculpatory evidence, based on the facts of each case.

In this case, the trial judge, in his September 2, 1992, order, directed the prosecution to turn over documents that were "known to exist or *which with due diligence could be determined to exist,* and to allow the attorneys [for Wilson] to inspect, test, examine, photograph or copy the same." (Emphasis added.) Apparently, the trial judge found, in denying Wilson's Rule 32 petition, that Wilson's attorneys "were on notice that Dr. Maier had interviewed White in compiling his evaluation and should have anticipated that he took notes during the interview," thus suggesting that Wilson's attorneys should have done more than they did by filing the discovery request and the motions to expedite. The trial judge did not articulate what he meant by stating in his September 2, 1992, order that the prosecution should exercise "due diligence," and he did not explain why he thought Wilson's attorneys had an obligation to do more than they did when they filed specific motions to produce that I believe included the notes. On remand, the trial judge would have an opportunity to address this issue also. In doing so, the trial judge might consider the holding in *United States v. Brooks*, 966 F.2d 1500 (D.C.Cir.1992), where the Court of Appeals for the District of Columbia Circuit held that the prosecution had violated the principles of *Brady* by failing to search for easily obtainable information. In support of this holding, the court stated:

> "Of course the prosecutor's own interest in avoiding surprise at trial gives him a very considerable interest to search accessible files for possibly exculpatory evidence, quite independent of *Brady*. Accordingly there is less need for a judicially constructed incentive than in the classic *Brady* situation, where prosecutors already possess the information but may have little incentive to divulge it apart from the *Brady* rule itself. *We suspect the courts' willingness to insist on an affirmative duty of inquiry may stem primarily from a sense that an inaccurate conviction based on government failure to turn over an easily turned rock is essentially as offensive as one based on government non-disclosure. See, e.g., Calley v. Callaway*, 519 F.2d 184, 223 (5th Cir.1975)...."
>
> *Brooks*, 966 F.2d at 1502-03. (Emphasis added.)

The second element of a *Brady* analysis relates to whether the suppressed evidence was favorable to the defendant. The trial judge, in denying Wilson's Rule 32 petition, said, in part:

> "Based upon all the evidence and the stipulation entered by the parties, the Court finds that even had the apparent inconsistency been used in White's examination,

there is no significant chance that the jury would have reached a *different* result. There were some inconsistencies in White's testimony at trial, but there were many other factors considered by the jury. The record is replete from credible witnesses linking the Petitioner to Mr. White and the crime. The fact that Dr. Maier's 'additional notes' may have been useful to the defense is not the legal question. The Court specifically finds that this additional evidence would not have changed the outcome of the trial."

On remand, the trial judge could reevaluate that finding in view of what I have said and in view of his consideration of any further evidence that might be presented on remand. To assist the trial court, I would note that there can be little question that Dr. Maier's notes were favorable to the defense. White was the prosecution's star witness; Wilson could not be convicted of capital murder without this witness's testimony.[12] The statement by White to Dr. Maier that he committed the crime between 6:00 and 6:30 p.m. is favorable to the defense, because it is undisputed that both Wilson and the prosecution presented evidence of her whereabouts at this time, thus giving her an alibi. In addition, this evidence could have been used by Wilson to impeach White's trial testimony.

The third determination that must be made in a *Brady* analysis is whether the suppressed evidence was "material" to the issues presented at trial. The United States Supreme Court, on at least two occasions, has addressed and modified the standard for determining whether certain evidence was material to the issues presented at trial.[13] In *Bagley*, the Court held that favorable evidence "is material" and constitutional error results from its suppression by the prosecution "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. at 682, 105 S.Ct. at 3383. However, in the recent opinion in *Kyles v. Whitley,* that Court refined the definition of *Brady* materiality that it had given in *Bagley,* citing four aspects of materiality that bear emphasis under the standard articulated in *Bagley.*

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[12] *See* note 5.

[13] *See* note 9.

First, "[a]though the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles,* 514 U.S. at —- —, 115 S.Ct. at 1565-66. In explaining this aspect of materiality, the Court explained:

> "*Bagley's* touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.' "

Kyles, 514 U.S. at —, 115 S.Ct. at 1566. Second, *Bagley* materiality should not be considered a sufficiency-of-the-evidence test. "One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." 514 U.S. at —, 115

S.Ct. at 1566. Third, in terms of *Bagley* materiality there is no such thing as harmless error. "[O]nce a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless error review." 514 U.S. at ----, 115 S.Ct. at 1566. In other words, once a *Brady* violation has occurred, a court should not consider whether the suppression was harmless error; the court should determine only whether the suppressed evidence was "material." "The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item-by-item." 514 U.S. at ----, 115 S.Ct. at 1567. In other words, a reviewing court must look at all the evidence that was suppressed, collectively, when determining whether the evidence was "material." *Id.*

Based on the foregoing facts, I would not quash the writ relating to the judgment entered in the Rule 32 appeal, but would remand the cause to the Court of Criminal Appeals with directions to order the trial court to take whatever action is deemed necessary to answer questions similar to the ones that I pose in this opinion, and to reevaluate its prior decision in view of the legal principles that I have set out in this opinion.

It appears to me that Wilson is at least entitled to have the trial court conduct further hearings and make further inquiries to determine whether Wilson has met her burden of showing that she is entitled to a new trial because of the State's failure to produce Dr. Maier's notes.

On remand, the trial court could take into consideration all of the factors I mention, in deciding whether Dr. Maier's notes are material evidence and whether, because of the failure to produce these notes, *Brady* requires that the defendant be given a new trial. In considering the ultimate issue, the trial court could consider whether Dr. Maier's notes are to be considered impeachment evidence, rather than exculpatory evidence; it could have been used to impeach White on cross-examination and in argument to the jury. The fact that these notes are only impeachment evidence is irrelevant, because there is no difference between impeachment evidence and exculpatory evidence in terms of raising a valid *Brady* claim. *See, Bagley,* 473 U.S. at 676-77, 105 S.Ct. at 3380-81; *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

In applying *Kyles* to determine whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,"[14] a court must look to the aspects of materiality announced in *Kyles,* and determine whether the suppression of *this* evidence "undermines confidence in the outcome of the trial." Here, the court should have considered the fact that the prosecution apparently thought that it was important to establish Wilson's whereabouts on the day of the murder, and that the defense took the position that White's testimony was specifically designed to comport with the prosecution's theory of how the crime occurred.[15]

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[14] *Bagley,* 473 U.S. at 682.

[15] White testified that he was so intoxicated on the afternoon of the murder that he could not remember what time it was when he killed Dr. Wilson or what time it was when Ms. Wilson allegedly picked him up. In fact, in all his statements to the authorities, including the seven statements given to the police and including his trial testimony, White never testified as to what time the murder occurred. In order to supplement White's testimony, the prosecution showed that Wilson's whereabouts were unknown from 4:55 to 5:25 p.m. that afternoon. The prosecution contended that it was during this time that Wilson participated in the murder by picking up White and delivering him to his truck. The prosecution attempted to further prove this theory through a witness who claimed she saw Wilson driving two blocks from the Wilson home around 5 p.m. that day. The defense attempted to disprove this theory by circumstantial evidence indicating that the murder took place after 5:15 p.m., thus giving Wilson an alibi and bolstering Wilson's contention that White was falsely implicating her to avoid the possibility of receiving the death penalty.

I believe that the trial court should reevaluate its previous determination about the effect of the nondisclosure of Dr. Maier's notes, and determine whether Dr. Maier's notes "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles,* 514 U.S. at ---, 115 S.Ct. at 1566.

I now consider Wilson's argument that White had recanted his trial testimony and that this recantation, coupled with other evidence, entitled her to a new trial. Wilson, in her motion filed pursuant to Rule 32.1(e), Ala. R.Crim. P., asked the court to grant a new trial based on "newly discovered evidence." The newly discovered evidence that Wilson argued required a new trial was White's recantation and the discovery of Dr. Maier's supplemental notes that I have discussed above. Wilson argued that these items of evidence, taken cumulatively, required a new trial.

The trial judge, pursuant to Rules 32.8 and 32.9, Ala. R.Crim. P., held a pretrial conference, followed by an evidentiary hearing. At that hearing, Wilson introduced evidence that White had recanted his trial testimony: that evidence consisted of a copy of White's recantation affidavit; the testimony of Mike McCulley, an inmate whose cell was near White's; and the testimony of a prison official who witnessed White's signature on the affidavit. She also submitted a copy of Dr. Maier's supplemental report. McCulley testified that White told him on many occasions that he had falsely implicated Wilson and Lowe, and he testified that White would often stay up late into the night, praying aloud for forgiveness for testifying falsely. Charles Edward Bailey, an employee of the Alabama Department of Corrections, testified that James White signed the affidavit in Bailey's presence while Bailey was working at the St. Clair Correctional Facility. The defense then called James White to the stand, but White refused to testify about his recantation, invoking his Fifth Amendment right against self-incrimination, which I do not believe that he could properly do.[16] Based on the foregoing, I believe that the Court of Criminal Appeals erred in affirming the trial court's ruling that White could invoke his Fifth Amendment right against self-incrimination, and that is another reason the cause should be remanded.

The trial judge ruled that Wilson had not carried the requisite burden imposed on one seeking a new trial.[17] The Court of Criminal Appeals affirmed. I believe that court erred. I would remand the cause to the Court of Criminal Appeals with instructions to direct the trial court to reevaluate its prior judgment denying Wilson's Rule 32 petition in light of what I have said in this opinion, and make return to this Court within a reasonable time after the certificate of judgment is entered; consequently, I respectfully dissent.

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[16] The prosecutor supported this action taken by White, and the trial judge ruled that White had the right to refuse to testify.

[17] Rule 32.3, Ala. R. Crim. P., states that a defendant petitioning for a new trial must prove "by a preponderence of the evidence the facts necessary to entitle the petitioner to [the requested] relief."

APPENDIX A

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

STATE OF ALABAMA

vs.

Case No. CC-92-1194Y

BETTY GAY WOODS WILSON

ORDER

The defendant in this case is charged by indictment with a capital felony. The discovery provisions of Rule 16, *Alabama Rules of Criminal Procedure*, should be deemed to establish the minimum discovery afforded the defendant as a matter of right. It is therefore, ordered by the Court as follows:

1. The Court directs that, subject to Paragraph 2, the District Attorney is to maintain an ongoing "open file" policy with regard to discovery by the defendant. Upon written request the State is to allow the defendant's attorneys full and complete access to all documents, statements, writing, photographs, recordings, evidence, reports, and any other file materials in possession of the State, or any police agency involved in this case, which is known to exist or which with due diligence could be determined to exist, and to allow the attorneys to inspect, test, examine, photograph or copy the same.

2. This Order should not be construed to require the State to disclose any notes, memoranda, writing or documents prepared by the District Attorney or his staff in trial

preparation or to disclose or produce any confidential material, unless such would be required to be produced under Rule 16 or the same would be otherwise discoverable under *Brady v. Maryland.* Any such material withheld from the defendant by the State is to be presented for an *in camera* review at a hearing to be set for such purpose. Copies of any material not required to be furnished the defendant [are] to be placed in a sealed envelope in the custody of the Clerk for preservation for possible review at a later date by this Court or an appellate court.

3. This Order is intended to expedite the case preparation and trial process as well as to simplify the issues for possible appellate review. It should not be construed to bestow on the defendant any absolute right to discovery not granted by the Constitution of the United States, the Constitution of Alabama, the laws of the United States or of Alabama, or case decisions or rules promulgated by appropriate court.

4. The State or the defendant may seek relief from or modification of any aspect of this Order upon timely request, and this Order may be amended by the Court as time and circumstances dictate.

This the 2nd day of September, 1992.

/s/Thomas N. Younger
THOMAS N. YOUNGER
Circuit Judge

APPENDIX B

IN THE CIRCUIT COURT OF TUSCALOOSA COUNTY,
ALABAMA
SIXTH JUDICIAL CIRCUIT OF ALABAMA

STATE OF ALABAMA,)
Plaintiff,)
)
vs.) Case No.: CC92-1893
)
BETTY WOODS WILSON,)
Defendant.)

MOTION TO EXPEDITE MOTIONS FILED

COMES NOW the Defendant, Betty Woods Wilson, by and through her attorney of record, and moves this Court to expedite its decisions on the following motions:

1. Motion for Recordation filed June 17, 1992;

2. Motion to Apply Heightened Standard or [sic] Review and Care In This Case Because the State is Seeking the Death Penalty filed July 17, 1992;

3. Motion to Inspect, Examine and Test All Physical Evidence filed July 17, 1992;

4. Motion to Reveal the Identity of Informants and Reveal any Deals, Promises or Inducements filed July 17, 1992;

5. Motion for Immediate Inspection of Documents and Tangible Objects filed July 21, 1992;

6. Petition for Psychiatric Examination of CoDefendant

filed July 30, 1992;

7. Motion to Suppress Evidence filed July 30, 1992;

8. Motion for Disclosure of Acts and Statements of CoConspirators filed July 30, 1992;

9. Motion for Production of Statements of Individuals Not to Be Called As Witnesses filed July 30, 1992;

10. Motion to Disclose Identity of Known and Unknown Unnamed Co-conspirators filed July 30, 1992;

11. Motion to Disclose Identity of Informant filed July 30, 1992;

12. Motion to Compel Disclosure of Search Warrants, Affidavits and Returns of Searches Conducted filed July 30, 1992;

13. Motion for Discovery of Institutional Records and Files Necessary to A Fair Trial filed July 30, 1992;

14. Ex Parte Motion to Order Sheriff to Allow Effective Right of Counsel [filed] July 30, 1992;

15. Motion for Notice By the Prosecution of the Intention to Use Evidence Arguably Subject to Suppression filed July 30, 1992;

16. Motion to Dismiss the Indictment on the Grounds that Its Two Counts are Duplicitous Or To Require The State to Elect A Single Offense filed July 30, 1992;

17. Motion for Production or Results of Polygraph Examination Conducted on Potential Prosecution Witnesses filed July 30, 1992;

18. Motion to Compel State to Affirm or Deny Electronic Surveillance filed July 30, 1992; and

19. Motion to Expedite Motions Filed and Request to Allow Defendant to Have a Dictaphone in Her Jail Cell filed August 8, 1992;

As grounds the Defendant would state the following:

1. This matter has been set for trial in Tuscaloosa County, Alabama beginning on February 22, 1993.

2. The above[-]referenced motions should be heard and a decision rendered as soon as possible, so that the Defense have an opportunity [sic] to prepare their case for the upcoming trial.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Court would hear the above[-]mentioned motions on an expedited basis, and render a decision as soon as practicable.

/s/ Marc Sandlin
Marc Sandlin
Attorney for Betty Woods Wilson
223 East Side Square
Huntsville, Alabama 35801
(205) 534-6321

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DIVISION OF ALABAMA NORTHEASTERN DIVISION

BETTY WILSON,)
Petitioner)
)
vs.) Case No: CV97-P-1481-W
)
E.L. HARRELSON, Warden, and)
The ATTORNEY GENERAL OF) ENTERED
THE STATE OF ALABAMA,) JUNE 16 1998
Respondents)

REPORT AND RECOMMENDATION

Betty Woods Wilson is an inmate in the custody of the Department of Corrections of the State of Alabama pursuant to a conviction and sentence imposed in March 1993 in Tuscaloosa County, Alabama, for the offense of capital murder. Ms. Wilson was sentenced to a term of life imprisonment without the possibility of parole. She seeks relief from that sentence and conviction through a writ of habeas corpus pursuant to the provisions of 28 U.S.C. § 2254. The matter is before the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b) and LR 72.1(b)(A). An Order to Show Cause was issued to the State of Alabama to which a reply has been received. Ms. Wilson has been notified of her obligation to respond to the submissions of the respondents. [Document #7, order citing *Hill v. Linahan*, 697 F.2d 1032 (11th Cir, 1983)]. No additional material has been provided by petitioner.

After consideration of the petition, exhibits, the brief of the parties, the appellate court opinions, and the trial record, it is **RECOMMENDED** that the petition for writ of habeas corpus be **DENIED**.

PROCEDURAL HISTORY

Betty Woods Wilson was convicted of hiring James Dennison White to kill her husband, Dr. Jack Wilson, a Huntsville ophthalmologist. This is a capital offense because the murder was "done for a pecuniary or other valuable consideration or pursuant to a contract or for hire." § 13A-5-40(a)(7), *Code of Alabama* 1975. After a jury found her guilty of the capital offense, petitioner waived the jury's participation in the penalty phase of the capital trial. The State recommended that petitioner be sentenced to life without parole and the court accepted the State's recommendation.

Petitioner filed a direct appeal of her conviction and sentence with the Alabama Court of Criminal Appeals. After oral argument, in February 1994, but before the court released a decision in the case, petitioner filed a petition for post-conviction relief pursuant to Rule 32, Ala.R.Crim.P., collaterally attacking her conviction and sentence based, in part, on an affidavit purportedly signed by White recanting his trial testimony and absolving petitioner.

The trial court held a hearing on the Rule 32 petition. Petitioner called White as a witness and attempted to cross-examine him regarding his purported affidavit recanting his trial testimony. However, White refused to answer based on his Fifth Amendment privilege against self-incrimination. Petitioner called another inmate who testified that White had told him he had lied at the Wilson trial. The inmate claimed to have overheard White praying out loud for forgiveness for having lied at that trial. After the hearing, the trial court in September 1994 denied the petition, finding, in part, that the testimony of the inmate concerning White's alleged recantation was not credible.

The direct appeal and the appeal of denial of the Rule 32 petition were consolidated for purposes of review by the

Alabama Court of Criminal Appeals. On January 13, 1995, that court affirmed petitioner's conviction and upheld the trial court's denial of the Rule 32 petition. *Wilson v. State*, 690 So. 2d 449 (Ala. Crim. App. 1995). Petition for rehearing was denied May 5, 1995. On January 17, 1997, the Alabama Supreme Court affirmed the conviction without opinion (Judge Maddox dissenting) and quashed a writ of certiorari with respect to the appeal of the denial of the Rule 32 petition.

Petitioner's federal request for relief from judgment or sentence pursuant to 28 U.S.C. § 2254 was filed in the United States District Court for the Middle District of Alabama on May 14, 1997. It was transferred to the Northern District of Alabama on May 29, 1997, and docketed in this district on June 18, 1997.

FACTUAL BACKGROUND

A review of the trial transcript reflects that the Court of Criminal Appeals' rendition of the factual background accurately reflects the trial testimony. That opinion set out the pertinent facts as follows:

> This state's evidence tended to show that the body of Dr. Jack Wilson was found in his home on Boulder Circle in Huntsville, Alabama, on May 22, 1992.[1] He had been severely beaten around the head, arms, and hands and had been stabbed twice in the chest. A bloody baseball bat was found approximately five feet from the body.
>
> Dr. Wilson died leaving an estate valued at approximately $6,300,000. The terms of Dr.

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[1] The appellant's motion for a change of venue was granted and the case was tried in Tuscaloosa County.

Wilson's will provided that the majority of his estate would go to his wife, the appellant, Betty Woods Wilson.

Dr. Joseph Embry, forensic pathologist for the Alabama Department of Forensic Sciences, testified that Dr. Wilson died as a result of injuries caused by the beating to his head and the stab wounds to his chest. He further testified that there were nine lacerations on Dr. Wilson's head. The lacerations ranged in size from 7/8 of an inch to 2 1/2 inches, in length. It was Dr. Embry's opinion that the lacerations were consistent with wounds that would be caused by a baseball bat.

At the time of appellant Wilson's trial, James Dennison White was under indictment for the murder, of Dr. Wilson. White, pursuant to a plea agreement, testified that he was hired by appellant Wilson and her sister, Peggy Lowe, to kill Dr. Wilson. He said that he met Lowe at his daughter's school in Vincent, Alabama, where he often did carpentry work. Their friendship developed after he did some carpentry work for Lowe, and they frequently talked on, the telephone. White said that one of the reasons he committed the murder was to win Lowe's affection. White said that Lowe once told him while they were talking on the telephone that she loved him. Lowe told White that she had a friend who was in a bad marriage and whose husband mistreated her. She told him that this friend wanted to get rid of her husband. White learned in March 1992 that this friend was in fact Lowe's sister, Betty Woods Wilson. White told Lowe that he had "connections" and could arrange for the murder of Dr. Wilson. Between late March 1992 and early April 1992, Lowe and White discussed having Wilson's husband killed. He testified that they agreed upon a price of $5,000. He said that Peggy Lowe called him later in April to tell him that her sister had given her one-half of the money to give to him.

White said that after he received the money paid some past due utility bills, deposited $500 in his bank account which had been overdrawn by over 4400, and spent the remaining money on his four children. By the end of April he had spent the money. The reason that White was in financial difficulty, he said, was because he had injured his right ankle and left knee at a previous job. White testified that he had an eighth grade education, that he had been married four times, and that he had drug and alcohol problems.

White testified that Lowe started pressuring him to murder Dr. Wilson after he had sexual intercourse with her on may 15, 1992. Lowe told him that if he did not murder Dr. Wilson, she would have to repay her sister. He stated that he told Lowe that in order to go to Huntsville to commit the murder he needed more money because he had spent the $2,5000 she had given him in April. Lowe told him to go to Lake Guntersville State Park and get some money from appellant Wilson who was at an Alcoholics Anonymous "AA" meeting. Lowe told him to go to Wilson's car, a black BMW, which would be parked near the entrance to the park and retrieve a book entitled The Sleeping Beauty and the Firebird. The car would be unlocked and the book would be on the back seat. The book, about a ballet, would have money in it to finance his trip to Huntsville to murder Wilson.

White arrived at Lake Guntersville State Park on the evening of May 16, 1992, but the security guard at the entrance gate would not let him enter. He told the guard that he needed to retrieve a book from appellant Wilson's car and that he had come a long distance to get it. The guard told him that he could try to contact Wilson on a pay telephone located at a service station several miles from the park entrance. White went to the pay telephone and called Lowe. Lowe told him to call the front desk at the lodge to try and locate her sister. White left a message for appellant Wilson at the front desk. He then waited by the front entrance and one of the guards brought the book to him. He testified that after he got the money and the book, he went to Huntsville and drove past the Wilson house and then returned to his trailer in Vincent.

White testified that not more than two days after May 16, he received a telephone call from Wilson. Appellant Wilson asked him what was "going on" and why he had not committed the murder. She also told him that she wanted Dr. Wilson murdered before may 24 because she did not want to go on their planned vacation with him.

White said that he was unable to get cartridges for his gun. On May 20, 1992, Lowe telephoned him and said that she had the "tool and equipment to do the job." He said that he met appellant Wilson and Lowe at Logan martin Dam. They were in appellant Wilson's black

BMW. Lowe got out of the BMW holding a sweater in her hand. She opened one of the doors to his truck and dropped a .38 caliber revolver, which had been wrapped in the sweater, on the seat. White went back to his trailer wrapped the gun in a towel, and hid it under some boards behind his trailer.

White stated that he was told that he would receive a telephone call telling him when to commit the murder. Early in the morning of May 21, 1992, he received a telephone call from the appellant. He said that he went to Mr. Wilson's office but decided not to kill him there because there were too many people around. He went to a pay telephone near theoffice, telephoned Lowe, and talked to appellant Wilson who was staying at Lowe's house. Hw told her that he needed some money so that he could spend the night in Huntsville. He said that appellant Wilson told himille. He said that appellant Wilson told him to meet her at the Chick-Fil A restaurant at Parkway City Mall in Huntsville around 12: 00 that day and that she would give him some money. White said that he stood in line at the Chick-Fil-A restaurant, was waited on by a girl named Christina, got a sandwich, walked outside, and sat down on one of the benches. Wilson also went through the line in the restaurant, walked outside, and handed him a bag that contained a $100 bill.

White then went to K-Mart, purchased a travel kit and some underwear, so that he could spend night in Huntsville. He then checked into a Ramada Inn. He decided to drive by the Wilson house to "check the layout" of the property, He said that he tried to act like a jogger, although he was dressed, in jeans. While he was in the Wilson's neighborhood he saw neighbor of the Wilson's doing yard work. He returned to the hotel and called Lowe. The following morning appellant Wilson telephoned him. White told her that she would need to drive him to their house so that no one would see him.

He testified that appellant Wilson met him at the Parkway City Mall around 3:00 p.m. on Friday, May 22, 1992. As he got out of his car to get in her BMW, he saw that she was wearing flowered tennis shoes. He got down on the floor of her car and she drove him to her house. When they pulled into the garage, she handed him $40 and told him where her husband's bedroom was located. Dr. Wilson was not home at this time. White testified that he decided not to use the gun and instead took along some rope. He said that he stayed in the house for what he believed to be several hours waiting for Dr. Wilson to arrive. As he walked on the landing of the stairs he came face-to-face with Dr. Wilson. They wrestled, he knocked Dr. Wilson down, and he grabbed an object that he later said that he could not identify beating Dr. Wilson with it. He testified that after this he "blanked out" and the next thing he remembers is finding himself behind the Wilson house in the woods. He buried a bag containing some clothes in the woods, went back to the house, and had appellant Wilson drive him to his car, which was parked at the mall.

The remaining $2,500 was to be left in Lowe's garage on the Sunday after the murder. He said he went to Lowe's house to get the remaining $2,500, but found no money in the garage.

Numerous witnesses corroborated various details of James White's testimony. Testimony was presented that corroborated his testimony that he received money in April to commit the murder. There was testimony that White, who had no steady job and had had no money for quite some time, had a great deal of money immediately before Dr. Wilson's murder. Linda Bush, head teller at First Bank of Childersburg, testified that on April 27, 1992, White deposited $500 to his checking account. He also made payments on some loans and bought two money orders. In all, he gave Bush over $ 1,000 in cash. Bush further stated that at the time he conducted the above banking transactions with her as the teller, she noticed that he had some money in his hand wrapped in a money wrapper indicating that it was $1,000. She further testified that James White had made no deposits to his account from January 22, 1992, to April 27, 1992. At the time of his April 27 deposit his account had a deficit balance of over $400.

Shirley Smith, the owner of Smith Grocery store in Vincent, Alabama, where White lived, testified that two weeks before May 22, White came into her store and paid her the amount of two of his checks that had been returned to her marked "insufficient funds."

The state also presented evidence that corroborated James White's testimony that appellant Wilson was unhappy in her marriage and that she wanted Dr. Wilson murdered. There was testimony that the marriage had deteriorated. Appellant Wilson and Dr. Wilson had separate bedrooms, and appellant Wilson had had several extra-marital affairs, one as recent as two weeks before Dr. Wilson's murder. JoAnn Chiri, a technician who worked in Dr. Wilson's office, testified that appellant Betty Wilson was unkind to her husband and that she had made the statement that she would rather be a well respected widow than a divorcee.

E.F.[2] testified that he met appellant Wilson at an AA meeting and that they had an affair. He testified that they frequently met at hotels but that they had also met at the Wilson house.

M.A.L., a former friend whom appellant Wilson had met through AA, testified that she ended her friendship with appellant Wilson after she learned that she was using her as an alibi when Wilson went to New York City to meet another man.

Brenda McDowell, Dr. Wilson's bookkeeper, testified that she once saw Wilson in the midst of a rage against Dr. Wilson and that Wilson told her to give Dr. Wilson a "message"; she then made an obscene hand gesture.

Shirley Green, the Wilson's housekeeper at the time of the murder, testified that the Wilsons slept in separate bedrooms, that appellant Wilson made many derogatory remarks about Dr. Wilson, and that she referred to a colostomy bag Dr. Wilson wore as a result of surgery as his "shit bag." Appellant Wilson told the housekeeper that there were many things about Dr. Wilson that she did not like. She further testified that appellant Wilson frequently had male visitors at the Wilson house.

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[2] Many of the witnesses who testified in this trial are members of Alcoholics Anonymous. In an effort to protect their identities in accordance with the goals of this organization, these witnesses will be referred to by their initials.

There was testimony that Wilson had previously inquired about hiring someone to kill Dr. Wilson in 1986. Brenda Cerha testified that appellant Wilson asked her about hiring someone to kill Dr. Wilson. Cerha became friends with Wilson after Cerha married Dr. Wilson's best friend. Cerha's husband committed suicide in 1986. Shortly after Cerha's husband's death in March 1986, appellant Wilson asked Cerha if she killed her husband. Cerha testified that appellant Wilson then stated to her: "I want to kill Jack. Will you help me and do you know how we can do it?" She testified that after this conversation with Wilson, their friendship deteriorated.

There was testimony that corroborated White's account of the occurrences at Lake Guntersville State Park. Keith Tucker, a security guard at the park, testified that on May 16, 1992, White came to the entrance gate and wanted to get a book from appellant Wilson's car. Tucker told him to go to a pay telephone and contact Mrs. Wilson through the front desk at the lodge. Robert Hawkins, another security guard at Lake Guntersville State Park, testified that he accompanied appellant Wilson to her black BMW to get the book. The car was unlocked and the book was in the back seat. Hawkins delivered the book to the appellant, who was waiting at the entrance gate. Similar testimony was given by David Stork, who worked at the front desk of the lodge at Lake Guntersville

State Park. Telephone company records confirmed that on May 16,1992, a 10-minute telephone call was made to Lowe's house from a pay telephone at a store about three miles from the entrance gate to Lake Guntersville State Park.

Other witnesses corroborated many other details of White's testimony. Ron White, manager of Chick-Fil-A restaurant at Parkway City Mall where James White said he ate on the day before the murder, testified that on May 21, 1992, an employee by the name of Christina was working at the food counter.

Vince Caruso, an associate at Camelot Music at Parkway City Mall, testified that on May 21, 1992, appellant Wilson bought two compact discs. The store was a two-minute walk from the Chick-Fil-A restaurant.

Karen James, an employee of K-Mart in Huntsville, testified that at 12:24 on May 21, 1992, an individual purchased aftershave lotion, a travel kit, and some men's underwear, and paid for the purchase with a $100 bill.

Gary Houck, manager of Ramada Inn, at which White said he spent the night, testified that James White stayed at the Ramada Inn the evening of May 21, 1992, that he paid cash for the room, and that he made several telephone calls from his room. Telephone records confirmed that White call Lowe. At 5:49 p.m. a one-minute call was made to Lowe's house, and at 8:03 pm. a six-minute call was made to Lowe's house.

Jim Garrett, a neighbor of the Wilsons, testified that on May 21, at 4:00 p.m., he saw a man, appearing to be a jogger, wearing jeans, go by the Wilson house and stop in front of it.

Mavis Kennedy, Peggy Lowe's next door neighbor, testified that on Sunday, May 24, two days after the murder, she saw White in the Lowe's garage.

A book from a public library was in White's possession at the time of his arrest. It had been checked out of the library by Betty Wilson. The name of the book was The Sleeping Beauty and the Firebird. Police testified that. appellant Wilson's gun was found near White's trailer in the place he told police to look for it.

Witnesses testified as to Wilson's conduct on the day of the murder. Peter Coulter, shoe manager at Yieldings department store in Parkway City Mall, testified that; on May 22, 1992, at 2:11 p.m., appellant Wilson bought a pair of flowered tennis shoes. Joan Williamson testified that appellant Wilson came to her office around 4:00 p.m. to pick up a check. David' Williams, a clerk at Whitesport Pharmacy, testified that appellant Wilson was there at 4:30 p.m. to get some prescriptions filled.

Sheila Irby, a neighbor of appellant Wilson's testified that she saw a man she identified as White limping in the direction of the Wilson house around 5:00 p.m. Irby further testified that she saw appellant Wilson driving toward her house, she thought, at around 5:15 p.m.

> N.N., a close friend of Wilson's through their meetings at AA, testified that she called appellant Wilson to see if the could meet earlier than the time that they had arranged to meet that day. Appellant Wilson declined, telling her that she had some shopping to do. N.N. told Wilson that she would like to go shopping with her. Appellant Wilson told her that she would just see her at the meeting around 5:30 p.m.
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> Belinda Schumann, an acquaintance of appellant Wilson's, testified that Wilson drove her car out of a parking space at the building at which the AA meetings were held at 5:25 p.m. Witnesses testified that Wilson did not arrive at the AA meeting Until 6: 00 p m. and that she was not in her, normal attire. Appellant Wilson normally "dressed up" for AA meetings, but on that day she was dressed casually and wearing flowered tennis shoes.
>
> Appellant Wilson's, defense was that she was trying to help White get into AA. Peggy Lowe testified that the occurrences at Lake Guntersville State Park merely constituted an effort by appellant Wilson to try to give money to White so that he could come to the AA meeting, at Lake Guntersville State Park and spend the weekend.

Wilson, 690 So. 2d at 451-55.

THE § 2254 PETITION

Petitioner claims three grounds for relief. They are:

1. **The State failed to produce exculpatory/impeachment evidence in the form of notes taken by a State-**

employed psychologist during an interview with James White, the State's key witness. The notes contain statements contradicting key points of White's testimony and the State's theory of the case.

2. At the evidentiary hearing on petitioner's Rule 32 petition, the court erroneously allowed White to assert his Fifth Amendment privilege against self-incrimination to avoid testifying about an affidavit purportedly executed by White under oath, admitting his trial testimony was fabricated and Wilson was innocent.

3. The trial court erred in failing to require the State to offer race-neutral reasons for its use of peremptory strikes to strike 9 of 15 blacks from the jury venire.

On direct appeal, petitioner listed numerous grounds of alleged error by the trial court. However, the only one pertinent to the § 2254 petition was petitioner's claim that the trial court erred in failing to require the State to offer race-neutral reasons for its use of peremptory strikes to strike 9 of 15 blacks from the jury venire.

In petitioner's Rule 32 petition, she asserted:

1. the prosecutors violated *Brady v. Maryland*, 373 U.S. 83 (1963), based on State's failure to disclose psychologist's notes of an interview with State's witness James White, and
2. there is newly disclosed evidence consisting of White's recantation of his trial testimony and an affidavit stating his trial testimony was fabricated and that Mrs. Wilson was innocent.

On appeal of the trial court's denial of her Rule 32 petition, Wilson asserted:

1. Error in overruling motion for new trial after White's alleged recantation;

2. Violation of *Brady v. Maryland*, based on the psychologist's notes; and

3. Error in allowing White to invoke Fifth Amendment at Rule 32 hearing.

STANDARD OF REVIEW

Petitioner filed her petition under 28 U.S.C. § 2254 in 1997. The Anti-Terrorism and Effective Death Penalty Act, effective April 24, 1996, amended 28 U.S.C. § 2254(d) as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28U.S.C. § 2254(d). Because petitioner filed her motion subsequent to the effective date of this code section, it is appropriate to apply it when reviewing the petitioner's habeas claims. *Lindh v. Murphy*, U.S. 117 S. Ct. 2059,138 L.Ed.2d 481 (1997); *Neelley v. Nagle*, 138 F.3d 917 (11th Cir. 1998).

THE BRADY CLAM

The State's chief witness against petitioner was James Dennison White, who testified that he was recruited by petitioner to murder her husband. Petitioner, in her Rule 32 proceeding, claimed that the State had, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), failed to disclose interview notes from a psychologist who evaluated White. According to petitioner, these notes reflect that White told the psychologist that he did not leave the Wilson residence until about 6:00 or 6:30 p.m. on the evening of the murder. Petitioner alleges that this conflicts with White's trial testimony and, had counsel for petitioner had these notes and been able to cross-examine White about them, the outcome of the trial probably would have been different because it would have undermined White's believability.

At the hearing on the Rule 32 motion, a joint stipulation of the parties was entered into evidence. It states as follows:

> 1. Dr. Lawrence R. Maier was appointed to do a mental competency evaluation, of James Denison White. Dr. Maier is regularly employed on a contract basis by the Alabama Department of Mental Health and Mental Retardation to evaluate all criminal defendants where there is a question as to their mental competency. Dr. Maier is employed to work in the Huntsville, Alabama, area. Maier's evaluation of White was the result of action taken by White's attorney, Roy Miller. The request by Miller for the evaluation was made in the case of State of Alabama v. James Dennison White, CC-92-1193-FJ. The evaluation was ordered by Judge Jeri Blankenship on July 14, 1992.
>
> 2. On August 5, 1992, Dr. Maier interviewed James Dennison White. Thereafter, Dr. Maier filed a formal report with the District Attorney of Madison

County, Alabama, with Judge Blankenship, and with Roy Miller.

3. Prior to the trial of Betty Woods Wilson for capital murder, the report prepared by Dr. Maier was supplied to Betty Woods Wilson's lawyers, namely Marc Sandlin, by Assistant District Attorney, Susan T. Moquin, pursuant to an order by Judge Thomas Younger.

4. It is the practice of Dr. Maier to cause his notes to be transcribed and typed. Dr. Maier's notes, taken during the interview of James Dennison White, were typed up into a three page document entitled "Additional Information Section." This document is attached hereto and marked-as "Exhibit A." These transcribed notes were sent by Dr. Maier to Taylor Hardin Secure Medical Facility as required by him of the Department of Mental Health and Mental Retardation. However, the notes were not supplied to, the District Attorney of Madison County, Alabama, to the Assistant District Attorney involved, to Judge Blakenship, to Roy Miller, or to special prosecutor, James Fry. The notes (Exh. A) were not supplied to Betty Wilton's lawyers prior to her trial.

5. The "Exhibit A" attached hereto was available to the Defendant, Peggy Lowe, in her case. A copy of the "Additional Information Section" or "Exhibit A" was sent by Peggy Lowe's lawyers to Jack Drake.

6. Until the "Addition al Information Section" was supplied to Drake, no lawyer for Betty Woods Wilson had ever seen "Exhibit A."

(Exhibit G, R.21-22, and Defendant's Exhibit 1)

An oral addition to the stipulation was made that no member of the prosecution or the police or anyone related to the prosecution had any knowledge of the existence of the transcribed notes of the psychologist, Dr. Lawrence R. Maier, at the time of trial. [Respondents' Exhibit G, R-22].

The alleged conflict regarding these notes is as follows: At trial, White testified he did not know what time it was he left the Wilson residence. [Respondents' Exhibit A, R. 514-15]. He also testified that petitioner picked him up in a mall parking lot about 2:30 p.m. and drove him to her home where he waited about 21/2 hours to 3 hours before Dr. Wilson arrived. [Respondents' Exhibit A, R. 498-501, 504]. He stated that he struggled with ahd killed Dr. Wilson, "came to" in the woods behind the house, had changed clothes and hidden the ones he had been wearing when he killed Dr. Wilson, and that Mrs. Wilson returned and carried him back to the shopping center. [Respondents' Exhibit A, R. 5 09-11].

The statements attributed to White in his interview with Dr. Maier were consistent with his trial testimony, except for the period of time stated in the notes that White waited inside the Wilson residence before Dr. Wilson arrived. The notes reflect that White told Dr. Maier that he left the Wilson residence at about 6:00 p.m. or 6:30 p.m. At trial, White did not state at what time he departed from the Wilson residence, stating that he did not know what time he left, but the chronology and other estimated times he gave would place him leaving the residence at about 5:00 p.m. to 6:00 p.m., or even later. [Respondents' Exhibit G; Exhibit A, R-39-429; Defendant's Exhibit 1].

Petitioner claims that the State violated its duty to provide her with all exculpatory material in its possession when it failed to disclose the transcribed interview notes of psychologist Dr. Lawrence R. Maier taken during interviews conducted to determine the mental competency of James

Dennison White. Dr. Maier is employed on a contract basis with the Alabama Department of Mental Health and Mental Retardation to evaluate all criminal defendants when their competency is questioned. The interview of White came about as a request for evaluation made by White's attorney, Mr. Roy Miller, and was ordered by Madison County Circuit Judge Jeri Blankenship on July 14, 1992.

After interviewing White, Maier caused his interview notes to be transcribed and typed. These notes were sent by Dr. Maier to the Taylor Hardin Secure Medical Facility as required by the Alabama Department of Mental Health and Mental Retardation. No copies of these notes were supplied to White's attorney, to the Madison County District Attorney's Office, to Judge Blankenship, or to special prosecutor James Fry. They also were not supplied to petitioner's counsel prior to trial.

At the Rule 32 hearing, one of petitioner's trial attorneys, Charles Hooper, testified that the defense was supplied with a copy of Dr. Maier's report in late August 1992, and that he and another of White's attorneys met with Dr. Maier at his office to discuss the report prior to petitioner's trial. (Respondents' Exhibit G, R. 60, 63). The report itself reflects that Dr. Maier interviewed White four times and that White had given Dr. Maier a "fairly detailed account of his movements, thoughts, behaviors and mental state at the time of the murder and for many hours before as well as several days after." [Respondents' Exhibit A, C. 405].

Testimony at the Rule 32 hearing also reflected that Dr. Maier did not work for the Madison County District Attorney but, rather, was a contract employee working for the Taylor Hardin facility. [Respondents' Exhibit G, R. 67-68]. Petitioner's trial counsel testified that, at the time he received the report, he was aware that Dr. Maier had interviewed White. [Respondents' Exhibit G, R. 68-69]. Trial counsel also stated that tying down the exact time when

White left the murder scene was an important factor in petitioner's defense, but, though White was cross-examined at length, he was never questioned about what time it was when he left the scene of the crime. [Respondents' Exhibit G, R. 70-74]. The circuit court denied petitioner's Rule 32 motion on the *Brady* claim after consideration of all the testimony and exhibits entered at that hearing, as well as the complete trial record and the judge's own recollection of the trial. [Respondents' Exhibit G, C. 50].

The court made the following findings with regard to this claim:

> [E]ven had the apparent inconsistency been used in White's cross-examination, there is no significant chance that the jury would have reached a different result. There were some inconsistencies in White's testimony at trial, but there were also many other factors considered by the jury. The record is replete with testimony from credible witnesses linking Petitioner to Mr. White and the crime. The fact that Dr. Maier's "additional notes" may have been useful to the defense is not the legal question. The Court finds specifically that this additional evidence would not have changed the outcome of the trial.
>
> Further, there is no evidence before the Court that Dr. Maier was ever an agent of the prosecution or that information known by him could be imputed to the prosecution. The Court finds that Dr. Lawrence Maier was not an agent, it or employee of the prosecution. The report and "additional, information" (interview notes) which he generated were done by order of Judge Jeri Blankenship at the request of White's defense counsel in *State v. White*. The evaluation of White was filed in this me and copies provided his attorney and the prosecution in White's case. Later, upon motion of Petitioner's attorneys, the

> evaluation was provided to the Petitioner by the State. It is uncontested that neither the prosecutors in *State v. White* nor the Special Prosecutor in Petitioner's case were aware of the existence of the "additional notes" prior to trial. The prosecution did not violate any right to the Petitioner to receive exculpatory evidence. The Court finds specifically that the State had no control over nor knowledge either actual or imputed of the complained evidence.
>
> Finally, as to the issue concerning "additional notes," it is clear that the evidence is not newly discovered. By stipulation and the testimony of Petitioner's attorney, Mr. Charles Hooper, it is clear that White's evaluation report was important to the defense. They requested and received a copy of the evaluation containing references to the dates and times White was interviewed by Dr. Maier. They were on notice that Dr. Maier had interviewed White in compiling his evaluation and should have anticipated that he took notes during the interview. Witness Hooper testified that he spoke with Dr. Maier prior to trial. Had the notes been requested they could have been produced by Dr. Maier voluntarily or by court order.

[Exhibit G, C. 50-51].

In *Brady v. Maryland,* the Supreme Court held that due process requires the prosecution to disclose evidence favorable to an accused upon his request when such evidence is material to guilt or punishment. 373 U.S. at 87, 83 S. Ct. at 1196-97. The government's duty to disclose favorable evidence under *Brady* covers not only exculpatory evidence, but also information that could be used to impeach a government witness. *Giglio v. United States,* 405 U.S. 150, 154, 92 S. Ct. 763, 766, 31 L.Ed.2d 104 (1972); *United*

States v. Bagley, 473 U.S. 667, 676-77, 105 S. Ct. 3375, 3380-81, 87 L.Ed.2d 481 (1985) (plurality opinion).

The government need not disclose information available from other sources. *United States v. Morris,* 80 F.3d 1151, 1170 (7th Cir.) (no *Brady* violation in failure to disclose exculpatory information held by the Office of Thrift Supervisor, SEC or IRS because, in addition to prosecutor's unawareness of such information, the defendants were just as aware of the agency investigation as the prosecution and, by reasonable diligence, could have obtained any *Brady* material held by such agencies), *cert denied,*___ *U.S.*___,117 S. Ct. 181, 136 L.Ed.2d 120 (1996); *Mills v. Singletary,* 63 F.3d 999, 1019 (11th Cir. 1995) (no *Brady* violation for failure to disclose a witness's psychiatric history because the records were available on request), *cert. denied,* 517 U.S. 1214, 116 S. Ct. 1837, 134 L.Ed.2d 940 (1996) ; United *States v. Mullins,* 22 F.3d 1365, 1370-71 (6th Cir. 1994) (no *Brady* violation in failure to disclose materials resulting from an interview with defendant's colleague, where government sent defendant a copy of colleague's "proffer" letter three months before trial and defendant had constructive knowledge through the newspapers); *United States v. Wolf,* 839 F.2d 1387,1391-92 (10th Cir.) (no *Brady* violation in failure to disclose gross tissue samples mentioned in medical report after defendant requested "all medical evidence in government's possession" because defendant received the report, clearly had notice the evidence existed and could have contacted the coroner directly to obtain the physical evidence), *cert. denied,* 488 U.S. 923, 109 S. Ct. 304, 102 L.Ed.2d 323 (1988). The government also need not turn over evidence the prosecutor could not reasonably be reputed to have knowledge of or control over. *United States v. Morris, supra; Weeks v. Jones,* 26 F.3d 1030, 1047 (11 th Cir. 1994) (no *Brady* violation in failure to disclose defendant's mental history where there was no showing that the government had this information, nor could have obtained it, and defendant was aware of his own mental history), *cert. denied,* 513 U.S. 1193, 115 S. Ct. 1258, 131 L.Ed.2d 137 (1995).

Nevertheless, even when a prosecutor does not himself possess *Brady* material, he has a duty to learn of any favorable evidence known to other government agents. *Kyles v. Whitley,* 514 U.S. 419, 436, 115 S. Ct. 1555, 1567, 131 L.Ed.2d 490 (1995). Moreover, failure to disclose all material evidence favorable to an accused violates due process whether or not the prosecutor acted in good faith. *Brady,* 373 U.S. at 87, 83 S. Ct. at 1196-97. Evidence is "material" if there is a reasonable probability that disclosure of the evidence would have changed the outcome of the proceeding. *United States v. Bagley, supra.* While this standard is not satisfied by "[t]he mere possibility that ... undisclosed information might have helped the defense, or might have affected the outcome of the trial," *United States v. Agurs*, 427 U.S. 97, 109-10, 96 S. Ct. 2392, 2400, 49 L.Ed.2d 342 (1976), neither does it require a showing that more likely than not, disclosure of the suppressed evidence would have resulted in an acquittal. *Kyles v. Whitley,* 514 U.S. at 434, 115 S. Ct. at 1566. The question is whether, in the absen ce of the suppressed evidence, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* Therefore, the defendant must show that the withheld evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435, 115 S. Ct. at 1566.

The Court of Criminal Appeals affirmed the Rule 32 court's denial of relief to petitioner on three grounds: (1) the information in Dr. Maier's notes was not, material to the outcome of the case; (2) the State had no duty to disclose this information because Dr. Maier was not an agent of the State and the prosecution had no knowledge of it; and (3) the petitioner's trial counsel could have obtained the notes from

Dr. Maier himself through the exercise of due diligence. [Respondents' Exhibit K at 40-41].

Since petitioner's Brady claim was adjudicated on the merits in state court, a writ of habeas corpus cannot be granted unless the adjudication of that claim 1) resulted in a decision contrary to, or involved an unreasonable application of clearly established federal law; or 2) resulted in a decision based upon an unreasonable determination of the facts in light of the evidence presented in the state court's proceeding. 28 U.S.C. § 2254(d). Petitioner has failed to demonstrate that the adjudication by the Rule 32 court, as affirmed by the Alabama a Court of Criminal Appeals, involved an unreasonable application of federal law or that the decision involved an unreasonable determination of the facts.

Preliminary to showing a *Brady* violation, petitioner must show that knowledge of Dr. Maier's notes could be imputed to the prosecution. Clearly, as stated in *Kyles v. Whitley,* a prosecutor "has a duty to learn of any favorable evidence known to others who are *acting on the government's behalf,* including the police." 514 U.S. at 437, 115 S. Ct. at 1567 (emphasis added). Generally, "acting on the government's behalf" applies to information or knowledge possessed by a witness who is part of the "prosecution team." *Stano v. Dugger,* 901 F.2d 898, 903 (1lth Cir. 1990). The "prosecution team" consists of the prosecutor and anyone over whom he has authority. *Stano v. Butterworth,* 51 F.3d 942, 974 (11th Cir. 1995); *United States v. Meros,* 866 F.2d 1304, 1309 (1lth Cir.), *cert. denied,* 493 U.S. 932, 110 S. Ct. 322, 107 L.Ed.2d 312 (1989).

It is uncontroverted that Dr. Maier interviewed White pursuant to a court-ordered mental competency evaluation requested by White's attorney, not by the government. Dr. Maier works under a contract arrangement with the Alabama

Department of Mental Health and Mental Retardation to conduct these evaluations. He is not an agent of the Madison County District Attorney's Office or of any law enforcement agency involved in the investigation of this case. Upon completing his evaluation of Mr. White, Dr. Maier sent the transcribed notes of his interviews to be filed at the Alabama Department of Mental Health and Mental Retardation. They were not sent to the prosecutor, the investigators or anyone else involved in the investigation of this case, nor did they have knowledge of the notes' existence. Therefore, the court concludes that the notes in question are not *Brady* material because they were not possessed by or known to the prosecution or by any member of the prosecution team.

In order to make out a *Brady* claim, in addition to showing that the State or an agent thereof suppressed information, petitioner must also show that she had no other source for this information, that the information was favorable to the petitioner and that, had the evidence been disclosed a reasonable probability exists that the outcome of the proceedings would have been different. *Hays v. Alabama*, *85* F.3d 1492, 1497 (11th Cir. 1996), *cert. denied*, ___*U.S.*___ 117 S.Ct. 1262, 137 L.Ed.2d 341 (1997). Petitioner's trial counsel received a copy of Dr. Maier's report well in advance of trial. The report reflects that Dr Maier interviewed White on four separate occasions. It also states that White was able to provide Dr. Maier with a "fairly detailed account of his movements, thoughts, behaviors and mental state at the time of the murder and for many hours before as well as several days after." [Respondents' Exhibit A, C. at 405]. Furthermore, after receiving the report, two of petitioner's trial counsel personally interviewed Dr. Maier concerning his report. The record reflects that trial counsel knew how to get records by subpoena and that they indeed did obtain other psychological records concerning White in this manner. [Respondents' Exhibit A, C. at 126-31, 287-96, 346-59]. Clearly, petitioner's trial counsel was on notice that interview notes might exist. With reasonable diligence they could have confirmed their existence and obtained them as easily as could the prosecutor. *United States v. Morris,* 80 F.3d at 1170; *Mills v. Singletary,* 63 F.3d at 1019; *United States v. Spagnoulo,* 960 F.2d 990, 994 (11th Cir. 1992); *United States v. Wolf,* 839 F.2d at 1391-97.

Petitioner must also show that suppressed evidence is material. This requires a showing that "the favorable evidence [withheld] could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Witley*, 514 U.S. at 435, 115 S. Ct. at 1566. The Rule 32 court concluded that there was "no significant chance that the jury would have reached a different result." Respondents' Exhibit G, C. at 501. The court noted that the legal question was not whether the notes would have been useful to the defense [Respondents' Exhibit G, *C.* at 51]. *See United States v. Agurs, 427 U.S.* at 109-110, 96 S. Ct. at 2400 ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.") The Alabama Court of Criminal Appeals agreed with the Rule 32 court. [Respondents' Exhibit K at 41]. The conclusion by the state courts that the notes in question were not material is neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court.

White never testified as to the time he left the Wilson home. He did testify that he was picked up in the mall parking lot by petitioner at about 2:00 p.m. on the day of the murder. (Respondents' Exhibit A at 4951. They took a short drive to the Wilson residence [*Id.* at 501]. Thereafter, he waited what he estimated to be about 2½ to 3 hours before the victim arrived home. [*Id.* at 506]. During that time, he was drinking alcohol and taking pills. [*Id.*]. When the victim finally arrived home, a fight ensued between himself and the victim. [*Id.* at 506-08]. Sometime thereafter, White found himself in the woods behind the residence. [*Id.* at 509]. He testified that he took the clothes off that he had on, changed into some others, and put the ones he took off in a bag which he stuck under a rock in the woods. [*Id.* at 572]. He then returned to the house, at which time the petitioner drove up. At that time, White testified, he jumped in her car and had her take him back to his truck. [*Id.* at 510].

Not surprising is the fact, given White's drinking and pill-taking, that his times are, at best, approximate. This testimony is not irreconcilable with Wilson's arrival at an AA meeting at "around 6" or "between 6:00 and 6:15." Furthermore, though petitioner's trial counsel had a copy of Dr. Maier's report which reflected several interviews with White during which he gave a "fairly detailed" factual account for his activities in and around the time of the murder, they failed to question Dr. Maier when they later interviewed him about any statements made by White concerning when. he left the Wilson residence. They also failed to address this point in their otherwise extensive cross-examination of White at trial. [*Id.* at 523-729]. This reflects that this point of evidence was not significant to petitioner's defense counsel. Thus, Dr. Maier's notes were, at best, marginally valuable for impeachment purposes and, in reality, not contradictory at all.

In addition, petitioner's trial counsel's cross-examination of White succeeded in obtaining admissions from White that he had given numerous contradictory statements to police [*Id.* at 526, 543] and had lied to them repeatedly before trial concerning the details of the murder. [*Id.* at 550, 565, 568, 577-79, 620, 633-34, 670, 693, 696, 697, 705, 725]. He also admitted to a dishonorable discharge from the army [*Id.* at 608-610], drug dealing [*Id.* at 600], bond jumping [*Id.* at 601], using illegal drugs [*Id.* at 647, 724], and to having been in and out of six or seven mental institutions [*Id.* at 711]. In short, petitioner succeeded in compelling White to admit to so many lies and crimes and mental health problems that the marginal impact of the suppressed statement would have been insignificant. *See Hays v. Alabama,* 85 F.3d at 1497-98.

WHITE'S ALLEGED RECANTATION

Petitioner's second claim alleges that the state court erred in allowing James Dennison White to invoke his Fifth Amendment privilege against self-incrimination at the hearing on her Rule 32 petition. Petitioner sought the testimony of White concerning an affidavit signed by White in which he claimed to be innocent and in which he stated he had lied when he testified that Wilson was involved. [Respondents' Exhibit G]. This claim is without merit. Evidence that does not bear on the constitutionality of petitioner's conviction, but is simply relevant to guilt or innocence, is not grounds for relief by federal habeas corpus. *Townsend v. Sain,* 372 U.S. 293, 83 S. Ct. 745, 9 L.Ed.2d 770 (1963). "Newly discovered evidence in the form of a confession of another does not render a conviction void and subject to collateral attack by habeas corpus because it goes to the merits of the conviction, not its legality." *Shaver v. Ellis,* 255 F.2d 509, 511 (5th Cir. 1958).[2] This rule applies even when the confession takes the form of a recantation by a codefendant. *Drake v. Francis,* 727 F.2d 990 (11th Cir. 1984); *Anderson v. Maggio,* 555 F.2d 447 (5th Cir. 1977) (habeas corpus relief based on a third-party confession unwarranted even though no evidentiary hearing was held at either the state or federal level).

In *Drake,* a Madison County, Georgia, barber was murdered. William Campbell and Henry Drake were arrested for the crime. Campbell was tried first and convicted, whereupon he agreed to cooperate with the State of Georgia. Campbell was the State's star witness against Drake who was convicted. A few years later, Campbell recanted his prior testimony and signed an affidavit professing Drake's innocence in the cases and admitting his own guilt. Drake then moved for habeas relief. The Eleventh Circuit denied relief, noting that "the role of habeas corpus is limited to consideration of challenges to the legality of a conviction; it may not be used to retry the defendant's innocence or guilt." *Drake*, 727 F.2d at 993 94.

---

[2] In *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981)(*en banc*), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1981.

In *Anderson*, the petitioners alleged that the district court's denial of their petition without holding an evidentiary hearing was improper in light of their allegations of newly discovered evidence that consisted of an affidavit by a witness recanting his trial testimony and an affidavit by a fellow inmate of Anderson's, Johnny Rogers, in which Rogers confessed to the crime and exculpated petitioners. *Anderson*, 555 F.2d at 451. In rejecting this claim, the Fifth Circuit stated that:

> Questions of guilt or innocence are not matters to be considered upon petition for habeas corpus. ... Newly discovered evidence in the form of a confession by another does not render the conviction void and subject to collateral attack by habeas corpus because it goes to the merits of the conviction, not to its legality ... [T]he confession "might be urged as the proper subject for executive clemency, but it affords no basis for judicial action."

Anderson, 555 F.2d at 451 (quoting *Shaver v. Ellis, supra)*. Thus, neither recantation by a witness at trial, nor confession to the crime by another is, in and of itself, sufficient to require federal habeas relief This and similar holdings are distinguished from situations where newly discovered evidence bears directly on the constitutionality of the conviction. For instance, if the petitioner claims the new evidence will show that the State had suborned perjury in obtaining a conviction against the petitioner, then the newly discovered evidence would bear on the constitutionality of the conviction and be subject to habeas review. *Smith v. Wainwright*, 741 F.2d 1248, 1257 (11th Cir. 1984). The Rule 32 court implicitly ruled out the possibility that the State suborned perjury when it made a finding of fact that White's trial testimony was credible. The Rule 32 court stated as follows:

> In support of the proposition concerning newly discovered material facts, the Petitioner offered, and the Court admitted, over the State's objection, an affidavit purportedly made by James Dennison White. The Court also considered testimony from Mike McCulley who was an inmate incarcerated with White at the Madison County Jail prior to Petitioner's trial. This witness testified that White made statements while in jail which, were inconsistent with his testimony at trial.
>
> At the Rule 32 Hearing, White was called as a witness by the Petitioner and as to matters relevant to recantation, refused to testify, claiming his Fifth Amendment privilege against self-incrimination. He neither admitted the contents of the affidavit nor explained any involvement with its production. The Court, to resolve this issue, must determine whether White's. testimony at trial was truthful or whether, assuming arguendo there is evidence of recantation, that the recantation is truthful. The burden is on the defendant to reasonably satisfy the Court that, assuming recantation, that it is the truth and that it would have changed the outcome of the trial.

Doubt exists concerning the circumstances surrounding the production of White's affidavit, and considering White's refusal to testify at the Rule 32 Hearing, whether or not the Petitioner has met the burden of proof to establish recantation. Assuming, but not finding, that there was a recantation, the Court must then determine which testimony is truthful. In making this determination, the Court considers all of the testimony given at this Hearing and all of the testimony given at the trial of the Petitioner. There was considerable evidence at the trial given by objective, good citizens, which supported the details of White's testimony. The testimony supporting recantation for the most part is from a convicted felon and an affidavit apparently from White which the Court has considered out of an abundance of caution that the Petitioner be treated fairly.

The Court received evidence that White has been sentenced to life in prison after the Petitioner's trial and that any recantation has been only after receiving the benefit of his plea bargain with the State to testify against Petitioner. As cited in *Peoples v. State*, 565 So. 2d 1177 (Ala. Cr. App. 1990), the Court finds that recanting testimony is inherently unreliable and untrustworthy.

Based upon the testimony of witnesses other than White at trial, as cited by the State, and the inferences drawn by this Court from those witnesses and others, the Court finds that the testimony of James Dennison White at trial was credible.

> The Court further finds evidence presented as to a recantation by White since trial does not reasonably satisfy the Court as to the truthfulness of any recantation, and, to the contrary, the Court finds that allegations contained in White's apparent affidavit is not creditable and is false.
>
> The Court further finds that the Petitioner has failed to meet the burden of proof necessary to establish any relief based upon a recantation by witness White.

[Respondents' Exhibit G at 51-52]. It is clear from this that the live testimony of James White would not have swayed the trial court.

The Rule 32 court also was clearly correct when it refused to force White to testify after he had asserted his Fifth Amendment privilege against self-incrimination. The Eleventh Circuit has held that district courts may not grant immunity to a defense witness simply because that witness possesses essential exculpatory information unavailable from other sources. *United States v. Gottesman*, 724 F.2d 1517 (11th Cir. 1984), citing *United States v. Thevis*, 665 F.2d 616, 639 (5th Cir. Unit B), *cert. denied*, 456 U.S. 1008, 102 S. Ct. 2300, 73 L.Ed.2d 1303 (1982). The *Thevis* court accepted the two major arguments against judicial grants of immunity that (1) the immunity decision would carry the courts into policy assessments which are the traditional domain of the executive branch, and (2) the immunity would be subject to the abuse of cooperative perjury among codefendants and co-conspirators. 665 F.2d at 639. That same reasoning applies in this case.

Petitioner's argument that White waived his Fifth Amendment privilege by signing the affidavit is also unavailing. It has been held that:

> [t]he privilege (against self-incrimination) attaches to the witness in each particular case in which he may be called on to testify, and whether or not he may claim it is to be determined without reference to what he said when testifying as a witness on some other trial, or on a former trial of the same case, and without reference to his declarations at some other time or place.

In re Neff, 206 F.2d 149, 151 (3d Cir. 1953). *See United States v. Fortin,* 685 F.2d 1297 (11th Cir. 1982) (citing *In re Neff* with approval). The Rule 32 court noted that White could be subject to prosecution for perjury if he testified. In that situation, his refusal to testify is protected by the Fifth Amendment. *Id.* at 1298-99 (defendants' refusal to testify is protected by their privilege against self-incrimination, where their testimony could have been used in aid of potential perjury charges notwithstanding that they had previously given sworn statements which were incriminating as to the crime of perjury). While there is arguably a conflict between a witness's Fifth Amendment privilege and a defendant's Sixth Amendment right to compulsory process, such conflict long ago was resolved in favor of the witness's right to silence. *Alford v. United States,* 282 U.S. 687, 694, 51 S. Ct. 218, 220, 75 L.Ed. 624 (1931).

Petitioner would have had the Rule 32 court compel White's testimony with a grant of use immunity, but that court had no justification for doing so and rightly refused. *Gottesman,* 724 F.2d at 1524. Therefore, the Rule 32 court's adjudication of this claim did not result in a decision contrary to, or involving an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor did it result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Title 28 U.S.C. § 2254(d). Therefore, petitioner's second claim is due to be denied.

BATSON CLAIM

Petitioner's last claim states that her conviction is due to be vacated because the trial court erroneously refused to require the State to offer race-neutral reasons for its strikes of black venire members, despite the State's use of its peremptory challenges to strike nine of the fifteen, or 60 percent, black venire members from the jury. Petitioner asserts that this ruling violates *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986).

The jury venire in this case consisted of 94 prospective jurors. Of these 94, 15, or 15.96 percent, were black. The petitioner's trial counsel struck two or 13.3 percent of the black venire members. The State struck nine, or 60 percent, of the black venire members. Four members of the black race, or 33.3 percent of the black veniremen, remained on the jury after strikes were completed.

Aside from bringing to the court's attention the number of strikes exercised by the State against black venire members, petitioner also alleged that the case had racial overtones because the State intended to call (and subsequently did call) a witness who was a black male who testified to having had an affair with petitioner. [Respondents' Exhibit A at 189]. This issue was raised by petitioner on direct appeal. The Alabama Court of Criminal Appeals reviewed this claim and found it to be without merit. That court noted that the State used nine of its 41 peremptory challenges to remove black venire members. This resulted in its using only 22 percent of its strikes to remove members of the venire who were black. The court stated that the mere fact that blacks are struck from the venire does not present a *prima facie* case of discrimination and found that a review of the records of the entire jury selection process did not reveal any evidence that the State exercised its peremptory strikes in a discriminatory manner. Therefore, it concluded that the trial court's holding that the appellant did not present a *prima facie* case of racial discrimination was not erroneous. [Petitioner's Exhibit C].

In reviewing this claim of error, this court must determine if the state court's adjudication of this issue on its merits resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law as determined by the U.S. Supreme Court or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

The clearly established federal law as determined by the United States Supreme Court is, in this case, *Batson v. Kentucky, supra,* which applies to petitioner, who is white, through *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L.Ed.2d 411 (1991). It must be determined whether the state court's finding that the petitioner failed to establish a *prima facie* case of discrimination, sufficient to require the State to give race-neutral reasons for its strikes of black veniremen, is contrary to, or involved an unreasonable application of *Batson, supra.*

When reviewing the resolution of a *Batson* challenge, great deference is given to the district court's finding as to the existence or non-existence of a *prima facie* case. *United States* v. *Stewart*, 65 F.3d 918 (11th Cir. 1995), quoting *United States v. Moore*, 895 F.2d 484, 486 (8th Cir. 1990) ("The trial judge ... is in by far the best position to make the *Batson prima facie* case determination ... *De novo* review of the record by this court would be inappropriate ...). The prima facie showing is a hurdle the party making a *Batson* challenge must clear before the striker is required to proffer any explanation for the challenged strikes. *Stewart*, 65 F.3d at 924 (citation omitted). The Eleventh Circuit in *Stewart* stated:

> No party challenging the opposing party's use of a peremptory strike – whether that party be the government, a criminal defendant or a civil litigant – is entitled to an explanation for that strike, much less to have it disallowed, unless and a prima facie showing is made. Accordingly, unless it concludes that a prima facie showing was made, an appellate court should neither reverse a trial court's action refusing to disallow challenged strikes, nor should it affirm a trial court's action disallowing strikes.

65 F.3d at 925. In *Batson*, the court explained that in order to determine whether a prima facie case has been established:

> [T]he trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the [party's] questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence the trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the [parties] use of peremptory challenges creates a prima facie case of discrimination against black jurors.

476 U.S. at 96-97, 106 S. Ct. at 1723. Although no particular number of strikes against blacks automatically indicates the existence of a *prima facie* case, it is an important factor to be

considered. *Stewart*, 65 F.3d at 918. In petitioner's case, statistics cut both ways. While the State struck 60 percent of the black veniremen, it only used nine of its 41 strikes, or about 22 percent of its total number of available strikes to remove them. However, if the State had cut 100 percent (15 out of 15) of the black venire members, it would still have only used slightly less than 37 percent of its total number of strikes. At the same time, though black venire members made up only about 16 percent of the total number of jurors on the full venire (15 of 94), four of the 12 jurors who actually deliberated the case, or 33.3 percent, were black. Furthermore, with 41 strikes available to it, the State could have easily struck all black venire members if so inclined. Thus, it is necessary to look at other factors in the record which might assist in determining if the trial court should have required race-neutral reasons for the State's striking of black veniremen. "In deciding whether the defendant has made the requisite showing, the ... court should consider all relevant circumstances." *Batson*, 476 U.S. at 96-97, 106 S. Ct. at 1723. Statistical evidence is merely one factor which the court examines, and it is not necessarily dispositive. *Cochran v. Herring*, 43 F.3d 1404, 1412 (11th Cir.1995).

Petitioner asserts that there were racial undertones to the case which would cause the State to intentionally and impermissibly strike black veniremen. This is based on the fact that during trial the State called several witnesses to testify about extra-marital affairs with petitioner, one of whom was a black male. However, this argument is not very persuasive. It assumes that white jurors would be prejudiced against petitioner because of this affair but black jurors would not. There is no basis for this assumption. This is especially true where, noting that during voir dire, one of petitioner's attorneys (Mr. Jack Drake) specifically addressed the jury about this matter as follows:

> MR. DRAKE: Okay. In this case there is going to be evidence that Dr. Wilson and Betty

> Wilson had an unusual marriage. There will be evidence that Betty had a couple of affairs during the time that she was married to Dr. Wilson. I want to lay that out for everybody so that you know now that that evidence will come in. Of course, she is not charged with that kind of conduct, but I need to know if there is anybody on this panel who would hold that kind of conduct against her and would not, for example, believe her if she testifies in the case, would tend to disbelieve what she said because she had had an affair while being married. Would it affect any of you that way? Would it affect any of you to the extent that you could not give her a fair trial?
>
> (No response.)
>
> MR. DRAKE: And, again, there is another aspect to it that I have got to just tell you about, and we have to do this, and I would appreciate your honesty if it makes any difference to you. There will be some evidence that she had an affair with a black man, and I need to know, again, if that would affect any of you and affect your ability, for example, to believe her. Would you tend to discount what she says because she had done that?
>
> (No response.)
>
> MR. DRAKE: Would it affect your ability to give her a fair trial?
>
> (No response.)

[Respondents' Exhibit A at 133-34]. The lack of response to these questions by all of the members of the jury venire reflects that the racial aspect of petitioner's extra-marital affairs was not a significant factor in the trial of this case. Furthermore, the petitioner and the victim were both white and the fact that petitioner's trial counsel asked only two questions related to the petitioner's interracial affair with no follow-up questions regarding the prospective jurors' general racial attitudes, reflects that petitioner's trial counsel did not see it as a significant issue in the case respecting the jurors' ability to be fair and impartial.

The court has reviewed the voir dire by petitioner's trial counsel and by the State. The State's questioning of venire members does not show that it had any racial animus. It was not cursory, but rather sought information concerning jurors' acquaintance with witnesses, pretrial publicity, any fixed opinion, circumstantial evidence, opposition to capital punishment, and willingness to impose the death penalty. Finally, there is the fact that four members of the jury that was selected were black. While not dispositive of the issue, the seating of blacks on the jury is a significant factor for the court to consider. *United States v. Stewart*, 65 F.3d at 926. Thus, it appears there were numerous factors sufficient to establish that the trial court was clearly justified in ruling as it did on this issue. It cannot be said that its finding that petitioner failed to make a *prima facie* showing of racially-motivated strikes by the State is contrary to or an unreasonable application of federal law. Neither is it an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Therefore, based upon a complete review of the entire record of this matter, the briefs and arguments of the parties and the applicable law, it is **RECOMMENDED** that petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be **DENIED**.

NOTICE OF RIGHT TO OBJECT

Any party who objects to this report and recommendation must, within fifteen (15) days of the date on which it is entered, file specific written objections with the clerk of this court. Failure to do so will bar any later challenge or review of the factual findings of the magistrate judge. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn,* 474 U.S. 140,106 S. Ct. 466, 88 L.Ed.2d 435 (1985) *reh'g denied,* 474 U.S. 1111, 106 S. Ct. 899, 88 L.Ed.2d 933 (1986); *Nettles v. Wainwright,* 677 F.2d 404 (5th. Cir. 1982) *(en banc).* In order to challenge the findings of the magistrate judge, a party must file with the clerk of the court written objections which shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection. A copy of the objections must be served upon all other parties to the action.

Upon receipt of objections meeting the specificity requirement set out above, a United States District Judge shall make a *de novo* determination of those portions of the report, proposed findings, or recommendation to which objection is made and may accept, reject, or modify in whole or in part, the findings or recommendations made by the magistrate judge. The district judge, however, need conduct a hearing only in his discretion or if required by law, and may consider the record developed before the magistrate judge, making his own determination on the basis of that record. The district judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Objections not meeting the specificity requirement set out above will not be considered by a district judge.

A party may not appeal a magistrate judge's recommendation directly to the United States Court of

Appeals for the Eleventh Circuit. Appeals may be made only from a final judgment entered by or at the direction of a district judge.

The clerk is, **DIRECTED** to serve a copy of this report and recommendation upon petitioner and counsel for respondents.

DONE this 15th day of June, 1998.

s/ Harwell g. Davis, III
HARWELL G. DAVIS, III
UNITED STATE'S
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DIVISION OF ALABAMA
NORTHEASTERN DIVISION

BETTY WILSON,)
Petitioner)
vs.) Case No: CV97-P-1481-W
)
E.L. HARRELSON, Warden, and)
The ATTORNEY GENERAL OF) ENTERED
THE STATE OF ALABAMA,) AUG 24 1998
Respondents)

FINAL JUDGMENT

On June 16, 1998, the magistrate judge's report and recommendation was entered and the parties were allowed therein fifteen (15) days in which to file objections to the recommendations made by the magistrate judge. Petitioner obtained an extension until July 31, 1998, to file objections. On July 31, 1998, petitioner filed objections to the magistrate judge's report and recommendation.[1]

After careful consideration of the record in this case, the magistrate judge's report and recommendation and the petitioner's objections thereto, the court hereby **ADOPTS** the report of the magistrate judge. The court further **ACCEPTS** the recommendation of the magistrate judge and it is, therefore,

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[1] Petitioner objects to the statements in the report and recommendation that petitioner was "notified of her obligation to respond to the submissions of the respondents. [Document #7, order citing *Hill v. Linahan*, 697 F. 2d 1032 (11th Cir. 1983)]. No additional material has been provided by petitioner." Petitioner states she filed a lengthy "Opposition to Motion for Summary Judgment" with attached exhibits on September 23, 1997. The filing to which petitioner refers is in the court records. A review of the magistrate judge's report and recommendation shows that the magistrate judge was in possession of and reviewed petitioner's opposition in preparing the report and recommendation.

ORDERED, ADJUDGED and DECREED that the petition for writ of habeas corpus in this action is due to be and the same hereby is **DENIED**.

DONE this the 24th day of August, 1998.

s/Sam C. Pointer, Jr.
CHIEF JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

BETTY WOODS WILSON,) Filed
Plaintiff(s),) 98OCT 14 pm12:40
) U.S. District Court
) N.D. of Alabama
vs.) No. CV97-P-01481-W
)
JOE HOPPER, ET AL,) Entered
Defendant(s).) OCT 16 1998

ORDER

The court hereby issues this certificate of appealability, concluding that, with respect to the State's failure to produce certain exculpatory and impeaching notes of a key witness, a substantial constitutional issue is presented.

Dated: October 14, 1998

s/ Sam C. Pointer, Jr.
Chief Judge Sam C. Pointer, Jr.

Service List:
Mr. R. Jackson Drake
Mr. Herman A. Watson
Mr. Charles R. Crowder
Mr. Bobby L. Cook, Sr.
Mr. Charles Hooper
Mr. Charles H. Pullen
Mr. Bill Pryor
Ms. Margaret S. Childers

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 98-6782
Non-Argument Calendar

District Court Docket No. 97-01481-CV

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAR 23 2000
THOMAS K. KAHN
CLERK

BETTY WOODS WILSON,
Petitioner-Appellant,

versus

MICHAEL W. HALEY, Commissioner,
Alabama Department of Corrections, et al.,
Respondents-Appellees.

Appeal from the United States District Court
For the Northern District of Alabama

Before COX, BARKETT and WILSON, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to

Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby AFFIRMED.

Entered: March 23, 2000
For the Court: Thomas K. Kahn, Clerk

By: s/Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: MAY 31 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6782
Non-Argument Calendar

D.C. Docket No. 97-01481-CV-P-W

FILED
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ELEVENTH CIRCUIT
MAR 23 2000
THOMAS K. KAHN
CLERK

BETTY WOODS WILSON,

Petitioner-Appellant

versus

MICHAEL W. HALEY, Commissioner,
Alabama Department of Corrections, et al.,

Respondents-Appellees

Appeal from the United States District Court
For the Northern District of Alabama

(March 23, 2000)

Before COX, BARKETT and WILSON, Circuit Judges.

PER CURIAM

Betty Woods Wilson appeals from the denial of her petition for habeas corpus pursuant to the provision of 28 U.S.C. Section 2254. The only issue raised on appeal is her claim that the prosecutors violated *Brady v. Maryland*, 373 U.S. 83 (1963), because the State failed to disclose a psychologist's notes of an interview with state's witness James White. We affirm for the reasons expressed in the Report and Recommendation of the magistrate judge dated June 15, 1998, which was adopted by the district court.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6782-CC

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 19 2000
THOMAS K. KAHN
CLERK

BETTY WOODS WILSON,

Plaintiff-Appellant,

Versus

MICHAEL W. HALEY, ET AL,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion ____________, 11th Cir., 19__, _____ F.2d _____).

Before: COX, BARKETT, and WILSON, Circuit Judges.

PER CURIAM:

The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, federal Rules of Appellate Procedure;

Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing are DENIED.

ENTERED FOR THE COURT:

s/ Roger Barkett
United States Circuit Judge

(3)

Supreme Court, U.S.
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No. 00-869

IN THE

SUPREME COURT OF THE UNITED STATES

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BETTY WOODS WILSON,

Petitioner,

v.

MICHAEL W. HALEY, ET AL.,

Respondents,

◆

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

◆

RESPONDENTS' BRIEF IN OPPOSITION

◆

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QUESTION PRESENTED

Is Wilson's *Brady v. Maryland* claim worthy of certiorari consideration when Wilson has not presented an issue decided in the courts below and she merely asks this Court to exercise its error-correcting function?

PARTIES TO THE PROCEEDING

1. Betty Woods Wilson - Petitioner;

2. Michael W. Haley, Commissioner, Alabama Department of Corrections - Respondent; and,

3. Bill Pryor, Alabama Attorney General - Respondent.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit affirming the denial of Wilson's federal habeas corpus petition is unpublished and contained in the Appendix to Wilson's Petition For Writ Of Certiorari at App. E-3-4. The decision of the United States District Court for the Northern District of Alabama denying Wilson's federal habeas corpus petition, pursuant to a magistrate judge's Report and Recommendation, is unpublished and contained in the Appendix at App. C-1-2. The Report and Recommendation is unpublished and contained in the Appendix at App. B-1-42. The decision of the Alabama Court of Criminal Appeals affirming Wilson's conviction and the denial of her petition for post-conviction relief under Rule 32, Alabama Rules of Criminal Procedure, is reported at *Wilson v. State*, 690 So. 2d 449 (Ala. Crim. App. 1995), *cert. quashed*, 690 So. 2d 477 (Ala. 1997).

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STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit affirming the denial of Wilson's federal habeas corpus petition was entered on March 23, 2000. (Pet. App. E-3-4) Wilson's petitions for rehearing and rehearing en banc were denied on May 19, 2000. (Pet. App. F-1-2) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

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STATUTE INVOLVED

This case involves the following portion of Section 2254 of Title 28 of the United States Code:

> (d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

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STATEMENT OF THE CASE

On March 3, 1993, Wilson was convicted by a jury of capital murder for her role in the hiring of another person to kill her husband, Dr. Wilson. (R1-5-Exhibit A-C. 511, 514-15; R. 2098, 2100-101) That day, Wilson was sentenced to life in prison without parole. (R1-5-Exhibit A-C. 511, 515; R. 2101-104) Wilson appealed her conviction to the Alabama Court of Criminal Appeals. (R1-5-Exhibit A-C. 512, 517, 531-34)

On June 23, 1993, while her appeal was pending in the Alabama Court of Criminal Appeals, Wilson filed a petition for post-conviction relief under Rule 32, Alabama Rules of Criminal Procedure, in the Tuscaloosa County Circuit Court. (R1-5-Exhibit G-C.

2-3) The Alabama Court of Criminal Appeals set aside the submission of the direct appeal and remanded the case to the trial court for an adjudication of the Rule 32 petition prior to a decision on the direct appeal. (R1-5-Exhibit G-C. 40) On September 1, 1994, the Rule 32 petition was denied. (R1-5-Exhibit G-C. 50-52)

On January 13, 1995, the Alabama Court of Criminal Appeals affirmed both the conviction and the denial of the Rule 32 petition in a written opinion. *Wilson v. State*, 690 So. 2d 449 (Ala. Crim. App. 1995). On January 17, 1997, the Alabama Supreme Court affirmed the conviction without opinion and quashed a writ of certiorari regarding the Rule 32 petition as having been improvidently granted. *Ex parte Wilson*, 690 So. 2d 477 (Ala. 1997).

On May 14, 1997, Wilson filed her federal habeas corpus petition in the United States District Court for the Middle District of Alabama. (R1-1) It was subsequently transferred to the Northern District of Alabama. (R1-1) The Magistrate Judge issued a Report and Recommendation on June 15, 1998, recommending that Wilson's petition be denied. (R2-12-35) Wilson filed objections to the order on July 31, 1998. (R2-15) On August 7, 1998, she filed substituted objections. (R2-16) The district court's final judgment denying the petition, pursuant to the Magistrate Judge's recommendation, was issued on August 24, 1998. (R2-17)

Wilson filed a Notice Of Appeal on September 23, 1998. (R2-18) On October 14, 1998, the district court granted a certificate of appealability regarding Wilson's *Brady v. Maryland*, 373 U.S. 83 (1963), claim. (R2-20) On March 23, 2000, the United States Court of Appeals for the Eleventh Circuit issued an unpublished opinion affirming the judgment of the district court. (Pet. App. E-3-4)

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ARGUMENT

Wilson's *Brady v. Maryland* claim is not worthy of certiorari consideration because Wilson has not presented an issue decided in the courts below and because she merely asks this Court to exercise its error-correcting function.

The issue in this case is not whether there was a *Brady v. Maryland*, 373 U.S. 83 (1963), violation, but instead is whether the United States District Court for the Northern District of Alabama correctly applied the standard governing federal habeas corpus claims under Section 2254(d) of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), in denying Wilson's *Brady* claim. Wilson's petition is, however, as was her brief before the United States Court of Appeals for the Eleventh Circuit, devoid of a single reference to amended Section 2254. Wilson makes no attempt to allege that the district court's analysis conflicts with a prior AEDPA decision of this Court or of another United States court of appeals, or that this case presents a novel question of important AEDPA law. Sup. Ct. R. 10. Instead, she merely presents her argument to this Court as a straightforward *Brady* issue. Her failure to present an issue raised by the proceedings below warrants denial of the certiorari petition.

"The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the

Court to deny a petition." Sup. Ct. R. 14.4. A petition must contain "[a] direct and concise argument amplifying the reasons relied on for allowance of the writ. See Rule 10." Sup. Ct. R. 14.1(h). Thus, Wilson's failure to provide this Court with guidance in determining whether it should grant certiorari by not alleging any specific certiorari grounds is a sufficient reason alone for this Court to deny certiorari.

Moreover, the three issues presented in the Argument portion of Wilson's petition merely assert that Wilson has made two of the three showings required to prevail on a *Brady* claim, that the State suppressed evidence and that the evidence was material. Wilson simply presents a standard *Brady* argument of the variety that would be presented on the first occasion to any state appellate court. But the real issue raised by the district court's ruling denying habeas relief, and the Eleventh Circuit's affirmance of that ruling, is whether the district court correctly found that the Alabama appellate courts did not unreasonably apply *Brady*, *see* 28 U.S.C. § 2254(d)(1), not whether a *Brady* violation occurred. She requests that this Court bypass the real issue and use its limited time to correct perceived errors in the application of settled law to a set of facts unique to her. The Respondents cannot imagine a better example than Wilson's petition for the cautionary instruction in Supreme Court Rule 10 that, "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Although mere error correction does have a place in this Court's jurisprudence, traditionally this Court has relegated it to a very minor role. For example, in *Kyles v. Whitley*, 514 U.S. 419, 456 (1995), Justice Scalia wrote, in dissent: "The Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally (i.e., except in cases of the plainest error) be denied." In *Pennsylvania v. Bruder*, 488 U.S. 9, 13-14 (1988), Justice Stevens, also in dissent, wrote:

> For reasons that are unclear to me, however, this Court seems to welcome the opportunity to perform an error-correcting function in cases that do not merit the attention of the highest court of a sovereign state. *See, e.g., Florida v. Meyers*, 466 U.S. 380, 104 S.Ct. 1852, 80 L.Ed.2d 381 (1984) (*per curiam*); *Illinois v. Batchelder*, 463 U.S. 1112, 103 S.Ct. 3513, 77 L.Ed.2d 1267 (1983) (*per curiam*). Although there are cases in which "there are special and important reasons" for correcting an error that is committed by another court, see this Court's Rule 17.1, this surely is not such a case. The Court does not suggest that this case involves an important and unsettled question of federal law or that there is confusion among the state and federal courts concerning what legal rules govern the application of *Miranda* to ordinary traffic stops. Rather, the Court simply holds that the Superior Court of Pennsylvania misapplied our decision in *Berkemer* to "[t]he facts in this record." *Ante*, at 206. In my judgment this Court's scarce resources would be far better spent addressing cases that are of some general importance "beyond the facts and

> parties involved." *Boag v. MacDougall*, 454 U.S. 364, 368, 102 S.Ct. 700, 702, 70 L.Ed.2d 551 (1982) (REHNQUIST, J., dissenting), than in our acting as "self-appointed . . . supervisors of the administration of justice in the state judicial system," *Florida v. Meyers*, 466 U.S., at 385, 104 S.Ct. at 1855 (STEVENS, J., dissenting).

Wilson's case is neither one in which the "plainest of errors" has occurred, nor one in which "special and important reasons" exist for correcting perceived error in the application of settled law to the facts of the case. Therefore, certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

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MICHAEL W. HALEY, Commissioner,
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Respondents

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel hereby certifies, pursuant to Rule 14(b), that the following persons and entities haven an interest in this petition:

Kristi Adcock – District Attorney
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Margaret S. Childers – Assistant Attorney General
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Betty Woods Wilson - Petitioner
Dr. Jack Wilson (deceased) – victim
Thomas N. Younger – Trial Judge

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STATEMENT OF THE CASE AND THE FACTS

The petitioner adopts the statement of the case and the facts set out in her original petition to this Court.

ARGUMENT AND CITATIONS OF AUTHORITY

I. WILSON'S PETITION PRESENTS IMPORTANT QUESTIONS REQUIRING CERTIORARI REVIEW.

In its brief in opposition to Wilson's petition for the writ of certiorari, the state argues that Wilson's *Brady*[1] claim is "not worthy" of certiorari consideration because "[t]he issue in this case is not whether there was a *Brady* ... violation, but instead is whether the United States District Court for the Northern District of Alabama correctly applied" the standard for habeas corpus claims. (Respondent's Brief in Opposition, p. 4)(emphasis in original). Finally, the state argues that there are no "special and important reasons" present in Wilson's case that would justify this Court's exercise of its error-correcting function. (Respondent's Brief in Opposition, p. 7).

It is respectfully submitted that the state's argument is simply incorrect. The issue in Wilson's case is, and has been throughout the entire appeals process, whether the state suppressed exculpatory interview notes taken by a court-appointed psychologist during his examination of James White, who the state alleged was Wilson's accomplice. As discussed in Wilson's petition, White was the state's key witness against Wilson. As recognized by the state in its plea agreement with White, the charge against Wilson "would, of necessity, have to be dismissed in absence of ... the testimony and cooperation of James Dennison White." *Ex parte Wilson*, 690 So. 2d 477, 485 (Ala. 1997) (Maddox, J., dissenting).

The suppressed interview notes contained statements by White regarding when the murder occurred, and when White was allegedly picked up by Wilson, that differed by one to one and one-half hours from the times given for those same events in the time line relied on by the state in Wilson's trial. In short, the suppressed interview notes were powerful evidence of Wilson's innocence, and would have devastated the state's case, had they been produced.

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[1] *Brady v. Maryland*, 83 S.Ct. 1194 (1963).

It is remarkable that the state has failed to present a single line of argument to this Court regarding whether a *Brady* violation occurred in Wilson's case. The petitioner suggests that the state could not credibly argue that no *Brady* violation occurred. It is also remarkable that the only case law relied on by the state in its brief in opposition consisted of two dissenting opinions, both of which were dissents in cases where a constitutional error was found to have occurred, and this Court used its error-correcting function to rectify those errors.

Finally, a "special and important" reason for certiorari review presented by Wilson's petition is the constitutional principle that underlies this Court's decision in *Brady v. Maryland* and its progeny. That principle is that the state, in its zeal to prosecute, cannot suppress exculpatory or impeaching information without violating the defendant's right to a fair trial. That principle was violated in Wilson's case, and she turns to this Court for relief. There can be no more appropriate circumstance for this Court to exercise its error-correcting function than in the instant case, where Wilson has been sentenced to life without the possibility of parole, a sentence which is, for all practical purposes, a death sentence.

Wilson prays that this Court will grant her petition for the writ of certiorari, and after doing so, issue an opinion reversing the decision of the Eleventh Circuit Court of Appeals.

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